

The allocation of resources for the realisation of women's rights: An analysis of article 26(2) of the Maputo Protocol

**Thesis presented in partial fulfilment of the requirements for the degree of
Master of Laws at the Stellenbosch University**

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DECLARATION

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Date: December 2020

SUMMARY

The Maputo Protocol is the leading women's rights treaty in Africa. However, the treaty can only be effectively implemented if resources, aimed at its realisation, are generated and spent through government policies and budgets. Article 26(2) of the Maputo Protocol provides that state parties are obligated to adopt all necessary measures, which include budgetary and other resources, for the full and effective implementation of the rights therein recognised. After examining how state parties to the Maputo Protocol and the supervisory bodies currently mobilise resources to realise women's rights, it was established that article 26(2) is severely underutilised and/or incorrectly applied by state parties. Some of the main reasons for this is a misallocation of resources and that state parties do not fully understand their obligations under the Maputo Protocol. Thus, women are left disempowered and unprotected.

To address these concerns, this thesis establishes the nature of state obligations under article 26(2) through developing an interpretative framework for resource allocation to realise women's rights. Anti-essentialist feminist legal theory and gender responsive budgeting are used as the theoretical framework guiding the research. As Africa is such a diverse continent, the analysis of anti-essentialist feminist legal theory ensures that the complex needs of women with multiple identities and lived realities are considered. The substantive realisation of human rights cannot be separated from resource allocation; thus, gender responsive budgeting provides a lens through which holistic budgeting for women's rights can be understood. This thesis also considers how other international supervisory bodies, such as the CEDAW Committee and the CESCR, have interpreted resource allocation for the realisation of human rights. These supervisory bodies have, through their various mandates, provided a rigorous interpretation of how state parties should generate and spend resources to ensure human rights are kept at the forefront.

This thesis finds that state parties to the Maputo Protocol, and the supervisory bodies, still have a long way to go to ensure that article 26(2) is fully interpreted and implemented. However, there are immediate steps which all parties can take, including commencing long-term strategies, which will result in more holistic gender responsive budgets and policies. The African Court, the African Commission, the Special Rapporteur, civil society and state parties all need to work together to ensure that women's rights are fully protected.

OPSOMMING

Die Maputo-protokol is die voorste vroueregteverdrag in Afrika. Die verdrag kan egter slegs effektief geïmplementeer word indien hulpbronne, wat op die verwesenliking daarvan gerig is, deur regeringsbeleid en -begrotings gegeneer en bestee word. Artikel 26(2) van die Maputo-protokol bepaal dat staatspartye verplig is om alle nodige maatreëls, wat begrotings- en ander hulpbronne insluit, vir die volle en effektiewe implementering van die regte wat in die protokol erken word, te tref. Nadat daar ondersoek ingestel is na hoe staatspartye tot die Maputo-protokol asook toesighoudende liggame tans hulpbronne mobiliseer om vroueregte te verwesenlik, is vasgestel dat artikel 26(2) ernstig onderbenut word en/of verkeerd deur staatspartye toegepas word. Van die hoofredes hiervoor is die foutiewelike toewysing van hulpbronne asook die feit dat staatspartye nie hul verpligtinge ingevolge die Maputo-protokol ten volle verstaan nie. Vroue word dus ontmagtig en onbeskermd gelaat.

Om hierdie bekommernisse aan te spreek, vestig hierdie tesis die aard van staatsverpligting in terme van artikel 26(2) deur 'n interpretatiewe raamwerk vir die toewysing van hulpbronne om vroueregte te verwesenlik, te ontwikkel. Anti-essensialistiese feministiese regsteorie asook geslagsresponsiewe begrotings word as teoretiese raamwerk vir hierdie navorsing gebruik. Aangesien Afrika so 'n uiteenlopende vasteland is, verseker die ontleding van die anti-essensialistiese feministiese regsteorie dat die komplekse behoeftes van vroue met veelvuldige identiteite en lewende realiteite in ag geneem word. Die substantiewe verwesenliking van menseregte kan egter nie van die toewysing van hulpbronne geskei word nie, dus bied geslagsresponsiewe begrotings 'n lens waardeur die holistiese begroting vir vroueregte verstaan kan word. Hierdie tesis oorweeg ook hoe ander internasionale toesighoudende liggame, soos die CEDAW-komitee en die CESC, die toekenning van hulpbronne vir die verwesenliking van menseregte geïnterpreteer het. Hierdie toesighoudende liggame het, deur middel van hul verskillende mandate, 'n noukeurige interpretasie van hoe staatspartye bronne moet genereer en bestee om te verseker dat menseregte op die voorgrond bly, gelewer.

Hierdie tesis bevind dat staatspartye tot die Maputo-protokol asook die toesighoudende liggame nog 'n lang pad het om te stap om te verseker dat artikel 26(2) volledig geïnterpreteer en geïmplementeer word. Daar is egter onmiddellike stappe wat alle partye kan neem, insluitend deur te begin met langtermyn strategieë,

wat meer holistiese geslagsresponsiewe begrotings en beleide tot gevolg sal hê. Die Afrika-hof, die Afrika-kommissie, die Spesiale Verslaggewer, die burgerlike samelewing asook staatspartye moet almal saamwerk om te verseker dat vroueregte ten volle beskerm word.

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"I wish it need not have happened in my time," said Frodo.

"So do I," said Gandalf, "and so do all who live to see such times. But that is not for them to decide. All we have to decide is what to do with the time that is given us."

JRR Tolkien *The Lord of the Rings: The Fellowship of the Ring* (1954)

"Frodo: 'What are we holding on to, Sam?'

Sam: 'That there's some good in this world, Mr Frodo. And it's worth fighting for.'"

P Jackson's 2002 Film Adaptation: JRR Tolkien *The Lord of the Rings: The Two Towers* (1954)

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ABBREVIATIONS AND SHORT TITLES

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
Beijing Platform for Action	Beijing Declaration and Platform for Action
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Cultural and Social Rights
CESR	Centre for Economic and Social Rights in New York
Compilation Reporting Guidelines	Compilation of Guidelines on the Form and Content of Reports to be Submitted by State Parties to the International Human Rights Treaties
Court Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights
GDP	Gross Domestic Product
HIV/AIDS	Human immunodeficiency virus and acquired immunodeficiency syndrome
ICESCR	International Covenant on Economic, Social and Cultural Rights
Limburg Principles	Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights

Maastricht Guidelines	Maastricht Guidelines on Violations of Economic, Social and Cultural Rights
Maastricht Principles	Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
NGOs	Non-Government Organisations
NHRIs	National Human Rights Institutions
ODA/GNI	Official Development Assistance by Gross National Income
OP-CEDAW	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
OPERA	Outcomes, Policy Efforts, Resources and Assessment
PANTHER	Participation, Accountability, Non-Discrimination, Transparency, Human Dignity, Empowerment and the Rule of Law
Principles and Guidelines	Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights
Reporting Guidelines	Compilation on the Form and Content of Reports to be Submitted by State Parties to the International Human Rights Treaties
Rules of Procedure	Rules of Procedure of the African Commission on Human and Peoples' Rights
SADC	Southern African Development Community
SADC Guidelines	Southern African Development Community Guidelines on Gender Responsive Budgeting

Solemn Declaration	Solemn Declaration on Gender Equality in Africa
Special Rapporteur	Special Rapporteur on the Rights of Women in Africa
UN	United Nations
UN Beijing Report	UN Women report on the Beijing Platform for Action
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
UNDP	United Nations Development Programme

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CHAPTER 1: INTRODUCTION

1 1 Research problem

For the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol") to be effectively implemented and, subsequently, the rights contained therein to be realised, resources have to be mobilised and allocated through government policies and budgets.¹ Under article 26(2) of the Maputo Protocol states are obligated to adopt "all necessary measures and in particular, shall provide budgetary and other resources for the full and effective implementation" of the rights recognised. As Govender argues, a "budget reflects the values of a country – who it values, whose work it values and who it rewards ... and who and what and whose work it doesn't".²

The Maputo Protocol has been ratified by 42 out of 55 African Union ("AU") member states.³ It was designed as a tool to realise women's rights on the African continent and to integrate a gender-equality perspective in regional and national policy.⁴ The Maputo Protocol covers the full spectrum of women's rights, including civil, political, social, cultural and economic rights. However, because it lacks a rigorous interpretative framework, state parties are still uncertain as to how to effectively realise women's rights in terms of the Maputo Protocol. This has resulted in an underutilisation and/or incorrect application of the Maputo Protocol in state parties' policies and national planning.⁵

In March 2017, the AU alongside the United Nations Entity for Gender Equality and the Empowerment of Women ("UN Women") and United Nations Human Rights Office of the High Commissioner released a report on the state of African women's human

¹ (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6.

² P Govender *Former Chair of the South African Parliamentary Committee on the Improvement of the Quality of Life and Status of Women* in D Budlender (ed) *The Women's Budget* (1996) Institute for Democracy in South Africa 7.

³ AU "List of countries which has signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2019) AU <<https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf>> (accessed 07-07-2020).

⁴ R Gawayia & RS Mukasa "The African Women's Protocol: A New Dimension for Women's Rights in Africa" (2005) 13 *Gender & Development* 42 42.

⁵ Editors *The Impact of the African Charter and the Women's Protocol in Selected African States* (2012) 194.

rights.⁶ This report highlighted key areas where the Maputo Protocol has not yet been effectively implemented. The report indicated, amongst other concerns that globally, 62% of all pregnancy and childbirth-related deaths occur on the African continent.⁷ The report furthermore established that 125 million African girls are married before the age of 18.⁸ The report attributed the lack of effective implementation to different factors such as limited state reporting in terms of article 26(1), maladministration, corruption and, importantly for the topic of this research, a misalignment of resources.⁹

There is little guidance in the Maputo Protocol as to how to interpret and apply the obligations provided in article 26(2). Without this guidance, there will be, as argued in this thesis, a lack of consistency in how state parties interpret and implement the Maputo Protocol, resulting in the ineffective realisation of women's human rights. The main objective of this research is therefore, to analyse the meaning and scope of "all necessary measures" and "budgetary and other resources" in article 26(2) to enhance the effective implementation of the rights contained in the Maputo Protocol. The research suggests that, relying on the correct interpretation of article 26(2), the Maputo Protocol has the potential to effectively protect African women's rights as well as provide appropriate remedies for violations of the rights contained therein.¹⁰

While this research focuses on women's rights, it is necessary to acknowledge that women in Africa are not a homogenous group who all face similar restrictions to realising their full human rights. Women face gender inequality as well as intersecting forms of discrimination on grounds such as age, economic status, racial or ethnic background, religion, nationality, citizenship, marital status, health, human immunodeficiency virus and acquired immunodeficiency syndrome ("HIV/AIDS") status, disability, poverty, gender identity and sexual orientation among others.¹¹ These various forms of discrimination often compound the discrimination that African women face. As Africa is such a vast, complex continent with multiple nationalities, religions, races, and languages, it stands to reason that African women share its

⁶ AU "Women's Rights in Africa" (2017) *Office of the United Nations High Commissioner for Human Rights*
<https://www.ohchr.org/Documents/Issues/Women/WRGS/WomensRightsinAfrica_singlepages.pdf>
(accessed 07-07-2020).

⁷ 11.

⁸ 11.

⁹ 52.

¹⁰ Article 25 of the Maputo Protocol.

¹¹ AU "Women's Rights in Africa" (2017) *Office of the United Nations High Commissioner for Human Rights* 16. See further chapter three part 3 3 1 below.

complexity. Therefore, this research's theoretical framework will be considered from the viewpoint that women have diverse identities which can result in multiple levels of discrimination.¹²

In April 1998, the African Commission on Human and Peoples' Rights ("African Commission") established the Special Rapporteur on the Rights of Women in Africa ("Special Rapporteur") to emphasise the challenges of women's human rights.¹³ To assist in the effective implementation of the Maputo Protocol, the mandate of the Special Rapporteur was aligned to include the domestication and realisation of the rights in the Maputo Protocol.¹⁴ The mandate of the Special Rapporteur includes assisting African states to develop and implement policies, which seek to promote and protect women's rights under the Maputo Protocol.¹⁵ The Special Rapporteur, therefore, plays a pivotal role in the realisation of women's rights in Africa. The work of the Special Rapporteur in terms of article 26(2) of the Maputo Protocol is accordingly also assessed in this research.¹⁶

1 2 Research aims and hypotheses

The primary research question of this thesis is: What is the nature of state obligations under article 26(2) of the Maputo Protocol? The primary hypothesis guiding the research in this regard acknowledges that article 26(2) of the Maputo Protocol has not been adequately interpreted by the relevant supervisory bodies to effectively realise women's rights. To fully engage with the primary research question, three secondary research questions, along with three secondary hypotheses, are considered.

The first considers how the African Commission and the African Court on Human and Peoples' Rights ("African Court") have interpreted resource allocation for the effective realisation of human rights in terms of the Maputo Protocol and the African Charter on Human and Peoples' Rights¹⁷ ("ACHPR")? The hypothesis aligned with this question is that a lack of sufficient, rigorous interpretation of resource allocation

¹² See further chapter three part 3 3 below for a discussion on multiple levels of discrimination and its role in anti-essentialist feminist legal theory.

¹³ ACHPR "Special Rapporteur on Rights of Women" (2018) *African Commission on Human and Peoples' Rights* <<https://www.achpr.org/specialmechanisms/detail?id=6>> (accessed 07-07-2020).

¹⁴ A Budoo "Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union" (2018) 18 *African Human Rights Law Journal* 58 64.

¹⁵ ACHPR "About: Mandate and Biographical Notes" (2018) *African Commission on Human and Peoples' Rights* <<http://www.achpr.org/mechanisms/rights-of-women/about/>> (accessed 07-07-2020).

¹⁶ See part 1 3 below for a discussion on the methodology of this research.

¹⁷ (Adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

under the Maputo Protocol combined with minimal interpretation under the ACHPR has led to discrepancies in the guidance provided to state parties with regard to their obligations to realise women's rights.

The second considers to what extent feminist legal theory and gender responsive budgeting can be used to assist in the interpretation of the resource allocation instruction under article 26(2) of the Maputo Protocol? The hypothesis aligned with this question is that feminist legal theory and gender responsive budgeting provides a comprehensive theoretical approach, which can assist in guiding the research in interpreting and evaluating state obligations relating to the resource allocation under the Maputo Protocol.

The third considers how an analysis of the interpretation of resource allocation for the effective realisation of human rights under the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")¹⁸ and the International Covenant on Economic, Social and Cultural Rights ("ICESCR")¹⁹ can assist in guiding supervisory bodies to interpret and evaluate article 26(2) of the Maputo Protocol? The hypothesis aligned with this question is that resource allocation for the realisation of human rights has already been interpreted and analysed under CEDAW and the ICESCR and can thus provide guidance when interpreting article 26(2) of the Maputo Protocol.

As mentioned above, this research aims to create a framework within which the resource allocation and related state obligations prescribed in article 26(2) of the Maputo Protocol can be evaluated. Such a framework will be useful to supervisory bodies, state parties, civil society and rights holders in terms of the Maputo Protocol because state parties' efforts to realise their obligations under the Maputo Protocol can be effectively interpreted and evaluated. It will furthermore be of value to supervisory bodies, such as the African Commission, the African Court, and the Special Rapporteur, to interpret and evaluate state parties' resource allocation to realise women's rights. This framework will also be of value to state parties who would be able to evaluate and adjust their own efforts to meet their own obligations in terms of article 26(2) of the Maputo Protocol. Rightsholders and non-governmental

¹⁸ (Adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

¹⁹ (Adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

organisations (“NGOs”) will also benefit from such a framework as they would be able to hold state parties accountable for their obligations under the Maputo Protocol.

1 3 Methodology and theoretical framework

This research commences by establishing the current interpretative practices relating to article 26(2) of the Maputo Protocol. Because neither the African Commission nor the African Court have analysed or applied article 26(2), this research relies on the interpretation of resource allocation and state obligations under the ACHPR. This includes analysing how the African Commission and the African Court have interpreted resource allocation and state obligations in terms of the ACHPR. African regional communications are consulted in this regard, as well as comments and observations released by the African Commission. The analysis of interpretative practices assists in identifying the gaps and shortcomings of interpreting article 26(2) of the Maputo Protocol. The effect of these shortcomings, such as inconsistencies in how state parties interpret their obligations under the Maputo Protocol, are identified and addressed.

The interpretation of article 26(2) of the Maputo Protocol and the allocation of resources also depends on a substantive interpretation of the various rights protected in the Maputo Protocol. However, a detailed interpretation of the substantive obligations imposed by all the rights in the Maputo Protocol will not be provided, as it falls outside the scope of the current research project. Instead, this thesis aims to identify the general principles that should guide the interpretation of article 26(2) of the Maputo Protocol, as informed by feminist legal theory and gender responsive budgeting.

Feminist legal theory and gender responsive budgeting are applied as a theoretical framework to aid in bridging the gaps that exist when interpreting resource allocation for women’s rights. The theoretical framework assists in interpreting resource allocation for the realisation of women’s rights as well as state obligations under the Maputo Protocol.

Feminist legal theory developed during the 1960s yet, feminist scholars only started analysing the legal structures that impeded justice for women instead of advancing it during the 1980s.²⁰ Today, feminist legal theory is focused on analysing law in three

²⁰ P Smith “Four Themes in Feminist Legal Theory: Difference, Dominance, Domesticity and Denial” in MP Golding & WA Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2006) 90 90.

ways: first, to identify sources of bias and injustice within it; secondly to utilise it in a way that advances justice for women within institutions and social practices; and thirdly, to identify and overcome devices of denial and other barriers to reform.²¹

This research particularly analyses the anti-essentialist strand of feminist legal theory to identify how anti-essentialism can be used to interpret and implement the Maputo Protocol. In essence, anti-essentialist scholars argue that the issue of “sameness” or “difference” does not only separate men and women but also women and women.²² Anti-essentialism also forms an important part of post-modern feminism. Post-modern feminism contends that individuals do not have fixed identities but rather have an identity that is “continuously constructed in different contexts by competing discourses”.²³ This allows for an intersectional understanding of feminism which aids in the interpretation and implementation of resource allocation under the Maputo Protocol. In this way, anti-essentialist feminism focuses the research on the importance of the Maputo Protocol as an African regional instrument that must serve all African women.

Gender responsive budgeting provides a practical governance tool to give effect to some of the key findings of anti-essentialist feminist legal theory. Gender responsive budgeting, as a concept, was developed in Australia in the 1980s. As a method, it sought to raise awareness within government of the impact the budget and policies have on women, to keep government accountable to gender equality goals and to bring about changes that would improve the socio-economic status of women.²⁴ Gender responsive budgeting requires an assessment of public policy and budgeting through a gender lens to ensure that resources are effectively allocated to realise women’s human rights.²⁵

Following the theoretical analysis, the practices of the Committee on the Elimination of All Forms of Discrimination Against Women (“CEDAW Committee”) and the Committee on Economic, Social and Cultural Rights (“CESCR”) are analysed to assist in interpreting article 26(2) of the Maputo Protocol. The interpretation of resource

²¹ 90.

²² JC Williams “Dissolving the sameness/difference debate: a post-modern path beyond essentialism in feminist and critical race theory” (1991) 2 *Duke Law Journal* 296 299.

²³ K van Marle & E Bonthuys “Feminist Theories and Concepts” in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 15 38.

²⁴ D Elson *UNIFEM Budgeting for Women’s Rights: Monitoring Government Budgets for Compliance with CEDAW* (May 2006) 1-932827-47-1 39.

²⁵ 10.

allocations under these treaties are explored from the viewpoint that the Maputo Protocol, similarly to CEDAW and the ICESCR contains rights which cannot be effectively implemented without adequate resources.

The ICESCR is assessed because of its clear reference to resource allocation in article 2(1) and the interpretative work that has been done in terms of resource allocation. The CESCR has conducted extensive interpretative work on resource allocation as well as state parties' obligation to mobilise resources. The ICESCR also contains a non-discrimination clause and a clause which ensures the equal enjoyment, for men and women, of the rights contained therein.²⁶

Resource allocation under CEDAW is analysed on the basis that it focuses on women's rights and could be considered similar to the Maputo Protocol in that regard. This analysis provides an insight into gender-specific resource allocation. The Maputo Protocol has also been referred to as a version of CEDAW which was designed for "Africans by Africans".²⁷ The CEDAW Committee has furthermore analysed state parties' obligation to mobilise resources for women's rights. The extensive literature on gender responsive budgeting in terms of CEDAW will consequently prove paramount to this research.

The final part of the research includes developing an interpretative framework for article 26(2) of the Maputo Protocol. The core concepts of anti-essentialist feminist legal theory and gender responsive budgeting are utilised as the theoretical lens through which the new framework will operate. The insight gained through the analysis of the work done by the CEDAW Committee and the CESCR guides the framework for resource allocation under the Maputo Protocol. This new framework includes recommendations as to how the African Commission, African Court and Special Rapporteur can appropriately assess state parties' obligations in terms of the Maputo Protocol to determine if these bodies prioritise women's rights in their resource allocation.

²⁶ Art 2(2) and 3 of the ICESCR respectively. These two clauses are addressed by the CESCR in two different, yet, closely related general comments. See, respectively, UN Committee on Economic, Social and Cultural Rights, General Comment 20 (forty second session, 2009) *Non-discrimination in economic, social and cultural rights (Art. 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/20; UN Committee on Economic, Social and Cultural Rights, General Comment 16 (thirty fourth session, 2005) *The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/2005/4.

²⁷ Gawaye & Mukasa (2005) *Gender & Development* 44.

1 4 Limitations

Resource allocation is important for the realisation of all human rights. This research, however, only focuses on resource allocation for the realisation of African women's rights. Women in Africa are considered a particularly vulnerable group who require the full protection and empowerment of the law.²⁸ This research considers the role that effective resource allocation plays in ensuring that African women are adequately protected and empowered under the Maputo Protocol. Consequently, this research takes a regional perspective in that it considers women's rights specifically under the African human rights system. Accordingly, the work of the AU, the African Commission and African Court plays a significant role throughout the research.

Furthermore, this research analyses and evaluates practices established under other international human rights treaties to establish an interpretive framework relevant to the Maputo Protocol. It focuses on international instruments which are closely related to the Maputo Protocol in their purpose or under which rigorous resource allocation interpretations have taken place. CEDAW is closely related to the Maputo Protocol in its mandate and purpose, as it also provides for women's rights.²⁹ The ICESCR contains a resource allocation provision, in terms of article 2(1) that is relevant to article 26(2) of the Maputo Protocol.³⁰ For this purpose, CEDAW and the ICESCR are analysed to provide an interpretative foundation for article 26(2) of the Maputo Protocol.

The Convention on the Rights of the Child³¹ protects the rights of the girl child and refers to maximum available resources to be made available to realise these rights.³² The African Charter on the Rights and Welfare of the Child³³ similarly considers the rights of the child, as well as the girl child. However, these treaties are not considered as it is beyond the scope of this research focusing particularly on women's rights.³⁴ These treaties provide for areas of further research and analysis in subsequent academic work.³⁵

²⁸ See part 1 1 above.

²⁹ See part 1 3 above.

³⁰ See part 1 3 above.

³¹ (adopted 20 November 1989, entered into force 2 September 1989) 1577 UNTS 3.

³² Art 4.

³³ (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49.

³⁴ Article 1(k) of the Maputo Protocol states that the treaty's referral to "women" includes "girls".

³⁵ See chapter six part 6 3 below.

1 5 Outline of chapters

Chapter 2, *The interpretation of article 26(2) of the Maputo Protocol*, focuses on the interpretation and implementation of resource allocation under the Maputo Protocol. Any interpretation by the African Court or the African Commission on resource allocation, not related to article 26(2), or the implementation of the Maputo Protocol is assessed. State reports submitted in accordance with article 26(1) of the Maputo Protocol and article 62 of the ACHPR are considered and the work of the Special Rapporteur is analysed. Resource allocation under the ACHPR to provide more substance to the provisions under the Maputo Protocol is analysed. In this regard, the interpretation by the African Commission and African Court of resource allocation and states' obligations in terms of the ACHPR is considered. Communications submitted to the African Commission by individuals and NGOs as well as the decisions on these communications are analysed.

Chapter 3, *Feminist legal theory and gender responsive budgeting: a theoretical lens*, evaluates and explains feminist legal theory and gender responsive budgeting. This chapter focuses on anti-essentialist feminist legal theory, its history, the differing views presented within this theory as well as its relevance to the research.

Particular attention is paid to anti-essentialist feminist legal theory because of its responsiveness to intersecting grounds of discrimination. The second part of this chapter examines the role of gender responsive budgeting in interpreting budgetary and resource allocation obligations under the Maputo Protocol. Gender responsive budgeting represents a practical governance tool to give effect to some of the key insights of feminist legal theory. The connection between gender responsive budgeting and feminist legal theory is furthermore analysed and evaluated within the context of the Maputo Protocol.

Chapter 4, *Resource allocation under CEDAW and the ICESCR*, focuses on the interpretative practices of resource allocation under CEDAW and the ICESCR. CEDAW is analysed to ascertain which methods have been most successful in terms of allocating resources for women's rights. State reporting under CEDAW is considered, as well as an analysis of the provisions in CEDAW that have been widely interpreted to require substantial resource allocation. Communications, as decided by the CEDAW Committee and concluding observations on state reports, are analysed

to establish best practices to effectively realising women's rights through appropriate resource allocation decisions. The implementation mechanisms of CEDAW and the special measures which state parties can take to realise their obligations as well as how they should budget to realise the rights in CEDAW, are further analysed.

In terms of the ICESCR, article 2(1) and the interpretation of "maximum available resources" by the CESCR are explored. Article 2(1) is interpreted considering the ICESCR, general comments, statements from the CESCR and concluding observations on state reports.³⁶ The different doctrinal norms which encompass article 2(1) are discussed and analysed.³⁷ This discussion is followed by an analysis of different resource allocation strategies under the ICESCR from the CESCR and scholars in this field. Generating resources to realise the rights in the ICESCR and spending resources to realise the rights in the ICESCR are then further considered.

Chapter 5, *Developing an interpretative framework for article 26(2) of the Maputo Protocol*, discusses new possible interpretations of article 26(2) of the Maputo Protocol considering the evaluation of resource allocation under the ACHPR, CEDAW and the ICESCR. An interpretative framework is suggested to realise women's rights together with possible guidelines and principles for effective implementation. This chapter begins by considering the interpretative framework for resource allocation for women's rights that the supervisory bodies need to follow within their various mandates. Then, the budgetary process is examined as well as how state parties should align this process with the principles of gender responsive budgeting and anti-essentialist feminist legal theory. What follows is an analysis of how state parties to the Maputo Protocol should be generating resources in ways which are sensitive to women with various identities and considers how state parties should spend their resources to realise their obligations in article 26(2) of the Maputo Protocol. Specific resource-intensive provisions and how state parties to the Maputo Protocol can best allocate resources to realise these rights are considered. As resource constraints are an issue that many African states face, this also forms a focal point of the discussion.

Chapter 6 concludes the research, summarises the main findings and sets out the significance of the interpretation of resource allocation and state obligations under the

³⁶ In terms of the CEDAW Committee, the clarifications released on certain provisions are called general recommendations, while the CESCR refers to it as general comments. The terminology utilised by the two committees will be used throughout this research.

³⁷ The doctrinal norms include maximum available resources, progressive realisation, retrogressive measures, minimum core obligations, extraterritorial obligations and non-discrimination and equality.

Maputo Protocol. Particular attention is paid to how this new interpretation will assist in the effective realisation of women's rights. Recommendations based on the findings of this research are presented, as well as areas for future research.

CHAPTER 2: THE INTERPRETATION OF ARTICLE 26(2) OF THE MAPUTO PROTOCOL

2 1 Introduction

Article 26(2) of Maputo Protocol obliges states to adopt “all necessary measures and in particular, [to] provide budgetary and other resources for the full and effective implementation of the rights” recognised therein. Neither the African Commission nor the African Court has directly applied article 26(2) of the Maputo Protocol. This chapter examines how the African Commission and the African Court have interpreted resource allocations for the effective realisation of human rights as guaranteed in the Maputo Protocol and the ACHPR. This analysis departs from the hypothesis that resource allocation under the Maputo Protocol has not been rigorously interpreted, which has led to inconsistencies in the guidance provided to state parties in terms of their obligations.

2 2 Resource allocation under the Maputo Protocol

2 2 1 Specific provisions of the Maputo Protocol

Article 26(2) is essential in understanding the obligations of state parties to ensure the realisation of the rights in the Maputo Protocol. It is the operational clause establishing the overarching obligations in relation to all the protected rights of the Maputo Protocol. However, as stated above, the Maputo Protocol provides little clarification as to what “full and effective implementation” entails. As suggested by Yeshanew, the obligation to “fully” realise the rights stipulated in the Maputo Protocol is not equivalent to realising these rights immediately.³⁸ These rights are resource intensive and will take time to realise fully. Thus, Yeshanew suggests that this provision could imply the progressive realisation of the relevant rights.³⁹ This would require states to constantly move towards the full enjoyment and improvement of these rights, even with apparent resource constraints.⁴⁰ Viljoen argues that this provision along with article 10(3) of the

³⁸ S Yeshanew *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theories, Laws, Practices and Prospects* (2011) 290.

³⁹ 290.

⁴⁰ L Chenwi “Unpacking ‘progressive realisation’, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance” (2013) 46 *De Jure* 742 743.

Maputo Protocol, establishes a “basis for review” by the African Commission.⁴¹ Article 10(3) of the Maputo Protocol stipulates that “[s]tate parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular”.

Yeshanew argues further that the obligations that articles 10(3) and 4(2)(i) of the Maputo Protocol create need to be read together with article 26(2).⁴² These provisions enable the African Commission and African Court to hold state parties accountable for the “misallocation of their budgetary resources”.⁴³ Thus, these rights may not need intensive budgetary allocations over time, and a reallocation of resources may suffice to realise these rights. While there are no guidelines as to how the obligation created in article 10(3) should be realised in practical terms, this provision shows that the promotion of women’s rights should be a priority for state parties, especially concerning military expenditure. This provision forms part of an agreement that state parties to the Maputo Protocol undertake to channel resources to the promotion of women’s rights.⁴⁴ However, as Budoo explains, this provision is difficult to enforce because the African Commission or the African Court will have to ascertain whether a state party has taken sufficient “necessary measures” to redirect this spending.⁴⁵ In this regard, they would in all likelihood have to assess the validity of an argument that non-compliance with article 10(3) is in the best interests of state security.⁴⁶

Moreover, article 4(2)(i) of the Maputo Protocol stipulates that “[s]tate parties shall take appropriate and effective measures to ... provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women”. This article recognises that transforming the pattern of violence against women is not possible without adequate resource allocation.⁴⁷ State parties often argue that it is challenging to prevent violence against women because of budgetary constraints.⁴⁸ They argue that realising this right would

⁴¹ F Viljoen “An Introduction to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” (2009) 16 *Wash & Lee J Civil Rts & Soc Just.* 11 33.

⁴² Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 294.

⁴³ A Budoo *The Role of Gender Budgeting in Implementing the Obligation to Provide Resources to Realise Women’s Human Rights in Africa* LLD thesis, University of Pretoria (2016) 83.

⁴⁴ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 291.

⁴⁵ Budoo *The Role of Gender Budgeting* 84.

⁴⁶ 84.

⁴⁷ 82.

⁴⁸ M Mutiithi “An analysis of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” in B Kombo et al *Journey to equality: 10 years of the Protocol on the Rights*

require significant budgetary allocation to, for example, increase police training, provide women's shelters, provide support services for survivors of sexual or domestic violence and equal access to justice for all women.⁴⁹

Articles 2 and 5 of the Maputo Protocol do not refer to resource allocation, but they do have resource implications for state parties because of the obligations they create. Article 2 calls for state parties to combat all forms of discrimination against women through "appropriate legislative, institutional and other measures". This entails including the principle of equality in national legislation, enacting legislation for the promotion of women's rights, integrating a gender perspective in policy decisions, taking corrective action where discrimination still exists and supporting initiatives focused on eradicating discrimination against women.⁵⁰ Article 2(2) states that:

"[S]tate parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men".

The obligations created in article 2 to enact legislation and combat all forms of discrimination against women, are arguably resource intensive for state parties.

Article 5 of the Maputo Protocol states that state parties shall, "prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards". This includes the enactment of necessary legislation, creation of public awareness, the prohibition of all forms of female genital mutilation, provision of necessary support to victims of harmful practices and protection of women at risk of such harmful practices.⁵¹ As this provision also contains the requirement for the enactment of legislation and other measures, it will also prove resource intensive for state parties. While, as indicated above, articles 2 and 5 do not explicitly provide for resource allocation, the obligations created through these provisions, read together with the substantial rights set out in articles 3 to 24, will require a substantial resource investment from state parties.

of Women in Africa (2013) 44 <<http://www.soawr.org/images/JourneytoEquality.pdf>> (accessed 07-07-2020).

⁴⁹ 44.

⁵⁰ Article 2(1)(a)-(e) of the Maputo Protocol.

⁵¹ Article 5(a)-(d).

2 2 2 African Court

As mentioned in the introduction to this chapter, where the supervisory bodies have interpreted resource allocation under the Maputo Protocol, it has not been done in terms of article 26(2) of the Maputo Protocol. However, the indirect interpretation is relevant, as it illuminates the inadequacies in the current implementation. Article 27 of the Maputo Protocol states that the African Court shall be seized with matters of interpretation and implementation arising from the Maputo Protocol. The African Court was established under article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights ("Court Protocol")⁵² to "complement the protective mandate of the African Commission".⁵³

Currently, 30 states have signed and ratified the Court Protocol.⁵⁴ Of these 30 states, 10 have made declarations allowing NGOs, with observer status before the African Commission, and individuals to bring cases directly to the African Court.⁵⁵ Due to two withdrawals, there are now only 8 state parties with existing declarations to allow NGOs and individuals to have observer status before the African Court.⁵⁶ This declaration, in terms of article 34(6) and by virtue of article 5(3) of the Court Protocol, provides *locus standi* to individuals and NGOs with observer status before the African Commission. The *locus standi* requirements make it difficult for individuals and NGOs to approach the African Court to hold state parties accountable.⁵⁷ In this regard, Rudman states that it appears that the capacity of individuals and NGOs to take a

⁵² (Adopted 10 June 1998, entered into force 25 January 2004) CAB/LEG/66.5.

⁵³ Article 2 of the Court Protocol.

⁵⁴ AU "List of Countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights" (2018) AU <http://en.african-court.org/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-jan_2017.pdf> (accessed 07-07-2020).

⁵⁵ AU "The Gambia becomes the Ninth Country to allow NGOs and Individuals to access the Africa Court directly" (2018) AU <<http://en.african-court.org/index.php/news/press-releases/item/257-the-gambia-becomes-the-ninth-country-to-allow-ngos-and-individuals-to-access-the-african-court-directly>> (accessed 07-07-2020).

⁵⁶ Rwanda, who had made an article 34(6) declaration in the past, officially withdrew their declaration in 2016. See Ministry of Justice "Clarification" (2016) Ministry of Justice <http://www.minijust.gov.rw/fileadmin/Documents/Photo_News_2016/Clarification2.pdf> (accessed 07-07-2020). Tanzania, who had also made an article 34(6) declaration in the past, officially withdrew their declaration in 2019. See International Justice Resource Centre "As African Court releases new judgments, Tanzania withdraws individual access" (2019) International Justice Resource Centre <<https://ijrcenter.org/2019/12/05/as-african-court-releases-new-judgments-tanzania-withdraws-individual-access/>> (accessed 07-07-2020).

⁵⁷ Budoo (2018) AHRLJ 58 62.

matter directly to the African Court was traded off against the “increased willingness of states to commit to the [Court] Protocol without the immediate burden of having to face aggrieved individuals in court”.⁵⁸ Another barrier for NGOs to access the African Court is the fact that in order for NGOs to bring a matter to the African Court, it needs to be accredited before the African Commission in terms of African Commission Resolution 361.⁵⁹

To date, the African Court has only heard two cases under the Maputo Protocol. The President of the African Court, the Honourable Justice Oré, has indicated that despite the number of ratifications of the Maputo Protocol, the expectations regarding the volume of litigation is “disappointing”.⁶⁰ The first case, *Mariam Kouma and Another v Republic of Mali*⁶¹ was declared inadmissible on the basis of non-exhaustion of local remedies.⁶² This case could potentially have provided significant interpretational guidance relating to the alleged violations of the rights to dignity, protection against violence, and access to justice contained in the Maputo Protocol.⁶³

APDF and IHRDA v Republic of Mali (“APDF”)⁶⁴ was the first case that the African Court heard on the merits under the Maputo Protocol. The main point of contention in this case related to the fact that the Malian Persons and Family Code⁶⁵ provided for marriages to be concluded with girls from the age of sixteen and, with the consent of her parents, even at the age of fifteen.⁶⁶ The litigants referred to violations of the obligation to modify harmful social and cultural practices, to have full consent in marriage, the minimum age of marriage, discrimination, and inheritance rights.⁶⁷ The African Court ordered the Persons and Family Code to be amended to ensure Mali abides by its obligations to protect girls from discrimination and marriage under the

⁵⁸ A Rudman “The protection against discrimination based on sexual orientation under the African human rights system” (2015) 15 *AHRLJ* 1 25.

⁵⁹ African Commission Resolution 361: Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples’ Rights in Africa. African Commission’s 59th Ordinary Session 21 October – 5 November 2016 Banjul, Islamic Republic of the Gambia ACHPR/Res361(LIX) 2016.

⁶⁰ Final Communiqué of the 59th Ordinary Session of the African Commission on Human and Peoples’ Rights, 21 October to 4 November 2016, Banjul, Islamic Republic of The Gambia, para 10.

⁶¹ Application No 040/2016.

⁶² Rule 40(5) of the Rules of the African Court on Human and Peoples’ Rights <http://en.african-court.org/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final_English_7_sept_1_.pdf>.

⁶³ Articles 3(1), 3(4) and 8(a).

⁶⁴ Application No 046/2016.

⁶⁵ Law No 2011 – 087 of 30 December 2011.

⁶⁶ *APDF and IHRDA v Republic of Mali* Application No 046/2016 paras 59, 60.

⁶⁷ Articles 2(2), 6(a)-(b) and 21 of the Maputo Protocol.

age of 18 in terms of the Maputo Protocol.⁶⁸ The African Court did not refer to resource allocation in terms of article 26(2) of the Maputo Protocol despite the instruction to amend legislation being substantially resource intensive. Practically, this would require a large investment from the state party's side to establish a task team to amend the legislation and ensure the effective administrative procedure and implementation.

The African Court also referred to article 25 of the ACHPR in its judgment, despite the applicants not having referred to a violation in terms of the ACHPR.⁶⁹ The applicants in *APDF* made specific reference to the obligations in the Maputo Protocol, yet the African Court tied the obligations and its recommendations to the ACHPR. Concerning article 25 of the ACHPR, the state party has an obligation to promote the rights and freedoms in the ACHPR. The respondent state, in this case, has an obligation to develop programmes and educational initiatives that would ensure all citizens are aware of the amendments to the Persons and Family Code.⁷⁰ The African Court could have, however, further applied articles 2 and 5 of the Maputo Protocol which would have supported the instruction to develop educational initiatives for citizens. The African Court would have then subsequently had to acknowledge the extensive resource commitment that articles 2 and 5 require from state parties. This case shows that while the African Court is hesitant to apply article 26(2) of the Maputo Protocol, it can still create obligations that require substantial resources for state parties through other provisions in the Maputo Protocol and the ACHPR. However, the question remains why the African Court did not mention and apply article 26(2) in this case as a direct indication to Mali to mobilise resources to extend and protect the rights violated.

2 2 3 African Commission

As mentioned above, the African Commission, which was established under article 30 of the ACHPR, is concurrently mandated to oversee the implementation of the Maputo Protocol.⁷¹ This mandate is derived from article 45(2) of the ACHPR and article 32 of

⁶⁸ *APDF and IHRDA v Republic of Mali* Application No 046/2016 para 130.

⁶⁹ Article 25 of the ACHPR states that state parties, "have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood".

⁷⁰ *APDF and IHRDA v Republic of Mali* Application No 046/2016 para 131.

⁷¹ See part 2 2 2 above.

the Maputo Protocol. Article 32 of the Maputo Protocol states that the African Commission “shall be seized with matters of interpretation arising from the application and implementation of this Protocol” pending the establishment of the African Court. As discussed in part 2.2.2 above, the African Court’s ability to engage with the Maputo Protocol is limited as only 30 state parties have ratified the Court Protocol⁷² and only ten state parties made article 34(6) declarations. In cases where a state party has not ratified the Court Protocol or made an article 34(6) declaration, a complaint can be submitted to the African Commission.⁷³ Such a complaint is referred to as a communication. The African Commission has, to date, not interpreted or implemented article 26(2) of the Maputo Protocol in its decisions on communications submitted to it. It has furthermore not referred any case to the African Court, under rule 118 of the Rules of Procedure of the African Commission on Human and Peoples’ Rights (“Rules of Procedure”)⁷⁴ and article 5(1)(a) of the Court Protocol, involving alleged violations of the Maputo Protocol.⁷⁵

Reference has, however, been made to article 26(2) of the Maputo Protocol in the African Commission’s general comments. For example, General Comment 2 focuses on article 14 of the Maputo Protocol (dealing with health and reproductive rights) and states clear requirements as to how these rights should be realised.⁷⁶ These include allocating “adequate financial resources for the strengthening of public health services” and making “specific budget allocations under the health budget at national and local level”.⁷⁷ General Comment 1, which also focuses on article 14 of the Maputo

⁷² African Court “Welcome to the African Court” (2019) *African Court* <<http://www.african-court.org/en/index.php/12-homepage1/1208-welcome-to-the-african-court1>> (accessed 07-07-2020).

⁷³ It is still uncertain how the African Commission will react in a case where a state party has ratified the Maputo Protocol and the Court Protocol but has not made an article 34(6) declaration. This is a complex matter as it is unclear whether the African Commission will refer the case to the African Court, in terms of article 27 of the Maputo Protocol, or whether the African Commission will hear the matter as an individual complaint. Article 27 of the Maputo Protocol indicates that the African Court shall be seized with matters of interpretation and implementation arising from the Maputo Protocol.

⁷⁴ AU “Rules of Procedure of the African Commission on Human and Peoples’ Rights” (2010) *AU* <http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf> (accessed 07-07-2020).

⁷⁵ The cases that have been referred to the African Court are *The African Commission on Human and Peoples’ Rights v Libya* (Application No 002/2013), *The African Commission on Human and Peoples’ Rights v Republic of Kenya* (Application No 006/2012) & *The African Commission on Human and Peoples’ Rights v Great Socialist Peoples’ Libyan Arab Jamahiriya* (Application No 004/2011). However, these cases made no mention of women’s rights or resource allocation.

⁷⁶ General Comment 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, *African Commission on Human and Peoples’ Rights* (2014) Adopted at the 55th Ordinary Session.

⁷⁷ Para 62.

Protocol, states that “state parties ... should fund and empower public health authorities to provide a comprehensive range of services for the prevention and treatment of every person’s sexual and reproductive health”.⁷⁸

General comments are used as a “tool for the interpretation and development of the provisions of relevant international legal instruments so as to guide the States in implementing their obligations”.⁷⁹ In this way, the African Commission fulfils its mandate to “formulate and develop rules and principles that address legal problems regarding the enjoyment of human and peoples’ rights”.⁸⁰ The general comments have been described as a “tool for advocacy and for interaction with policymakers at national and regional levels”.⁸¹ Arguably, state parties should also include, in their state reports, the measures that they have put in place to actualise the general comments.⁸²

While there are conflicting opinions as to the exact legal status of these general comments, where most scholars consider them non-binding,⁸³ the documents do constitute authoritative statements by the African Commission. The documents, themselves, also elaborate on their importance. This is evident in General Comment 1 where it is stated that “[f]ailure by a State Party to comply with article 14(1)(d) and (e) as clarified and enumerated in these General Comments will amount to a violation of the provisions of the said article”.⁸⁴ The general comments thus hold significance because they explain the legally binding provisions in the Maputo Protocol. Durojaye has elaborated on the status of the general comments by referring to article 32 of the Vienna Convention on the Law of Treaties⁸⁵ which states that, “recourse may be had to supplementary means of interpretation” to establish the meaning of the treaty.⁸⁶

⁷⁸ General Comment 1 on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, African Commission on Human and Peoples’ Rights (2012) Adopted at the 52nd Ordinary Session para 48.

⁷⁹ Para 1 of General Comment 1 and General Comment 2.

⁸⁰ Article 46(1)(b) of the ACHPR.

⁸¹ E Durojaye “The General Comments on HIV adopted by the African Commission on Human and Peoples’ Rights as a tool to advance the sexual and reproductive rights of women in Africa” (2014) 127 *International Journal of Gynecology & Obstetrics* 305 307.

⁸² 307.

⁸³ See R Murray & D Long *The Implementation of the Findings of the African Commission on Human and Peoples’ Rights* (2015) 67.

⁸⁴ Para 50.

⁸⁵ 1969 1155 UNTS 331.

⁸⁶ E Durojaye “The Role of the African Commission on Human and Peoples’ Rights in Developing Norms and Standards on HIV/AIDS and Human Rights” (2017) 17 *Global Jurist* 58 63.

Thus, the general comments could fall under these “supplementary documents” which can assist in the interpretation of the Maputo Protocol.

General Comments are described as “authoritative interpretive guidance” as they clarify the obligations of the state as a duty-bearer.⁸⁷ The Special Rapporteur has described these general comments as a response to the need to articulate measures that state parties should take in order to fulfil their obligations in terms of the Maputo Protocol.⁸⁸ Thus, these general comments provide guidance as to what state parties’ obligations are in terms of resource allocation for the health and reproductive rights in article 14 of the Maputo Protocol. The general comments are supplementary to the Maputo Protocol, which is binding on state parties.

The African Commission has dealt with the violations of women’s rights in one decision on communications through interpreting relevant articles in the ACHPR. In *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt*⁸⁹ the African Commission applied articles 2⁹⁰ and 18(3)⁹¹ of the ACHPR to find a violation of women’s rights. This decision dealt with gender-based violence and discrimination that four female journalists faced during a political demonstration in 2005. This decision recognised gender-based violence as a serious form of discrimination and a violation of women’s human rights.⁹² The complainants argued further that the respondent state had failed in its obligation to protect the victims from sexual violence.⁹³ Egypt has not ratified the Maputo Protocol and this decision could therefore not be decided in terms of the Maputo Protocol. However, the complainants in this decision referred to article 1 of the Maputo Protocol and argued that it emphasises violence against women as

⁸⁷ Newsletter of the Special Rapporteur on the Rights of Women in Africa on the Occasion of the 30th Anniversary of the African Commission on Human and Peoples’ Rights 22 <http://www.achpr.org/files/news/2017/11/d313/achpr_srrwa_newsletter_30th_anniversary_eng.pdf>.

⁸⁸ AU “General Comments on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” (2012) AU <<http://www.achpr.org/instruments/general-comments-rights-women/>> (accessed 07-07-2020).

⁸⁹ Communication 323/06: *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt* (2011).

⁹⁰ “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”.

⁹¹ “The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declaration and conventions”.

⁹² “EIPR and Interights v. Egypt” (2016) *LSE Centre for Women, Peace and Security* <<https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/eipr-and-interights-v-egypt/>> (accessed 07-07-2020).

⁹³ Communication 323/06: *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt* para 68.

all acts perpetrated against women that cause physical, sexual or psychological harm.⁹⁴ The African Commission also referred to articles 6 (suppression of all forms of traffic in women and exploitation of the prostitution of women) and 7 (elimination of discrimination against women in the political and public life) of CEDAW. The African Commission reiterated CEDAW's view that violence against women hinders women's right to equality and enjoyment of basic human rights.⁹⁵

2 2 4 State reporting

In terms of article 26(1) of the Maputo Protocol, states parties are obligated to submit state reports in accordance with article 62 of the ACHPR. The African Commission's interpretation of the Maputo Protocol can thus be ascertained through an analysis of state reports and the concluding observations on state reports that have been made in terms of the Maputo Protocol. Some state party reports undertake an analysis of resource allocation and gender responsive budgeting. The African Commission's response to these initiatives can be found in the concluding observations. Despite these concluding observations being non-binding on state parties, they are authoritative interpretation of states' obligations under the ACHPR and the Maputo Protocol. Durojaye describes these concluding observations as having the potential to create "norms and standards on human rights".⁹⁶ However, a mechanism does not exist by which the African Commission can ensure that state parties comply with the recommendations made in the concluding observations. Instead, the state reporting mechanism forms part of open communication between the African Commission and the state parties.

Budoo argues that more could be done by the African Commission to encourage state parties to elaborate on their gender responsive budgeting initiatives.⁹⁷ One such way would be for the African Commission to seek clarifications on these initiatives from state parties in terms of rule 75(3) of the Rules of Procedure. This rule states that "[r]epresentatives of State Parties shall respond to the questions prepared by the Commission ... and provide when necessary, any other information requested during or after the sessions".

⁹⁴ Communication 323/06: *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt* para 87.

⁹⁵ Paras 88 and 165.

⁹⁶ Durojaye (2017) *Global Jurist* 66.

⁹⁷ Budoo *The Role of Gender Budgeting* 213.

On the issue of the implementation and effectiveness of the gender responsive budgeting initiatives, the African Commission could consider shadow reports from NGOs and civil society. The African Commission could “invite specific institutions to submit information relating to the state report” which could supplement the information supplied by the state party.⁹⁸ In this way, the African Commission could formulate specific questions on implementation to the state party in terms of rule 75(3) of the Rules of Procedure.⁹⁹ In addition, shadow reports could also be submitted directly by NGOs and civil society to illuminate implementation challenges of gender responsive budgeting initiatives to the African Commission.¹⁰⁰

The African Commission, while acknowledging some resource allocation initiatives, has not made specific reference to gender responsive budgeting initiatives of state parties in their concluding observations on state reports. Concluding observations provide an opportunity for the African Commission to provide concept and implementation guidance on gender responsive budgeting. Especially since the state parties who have mentioned resource allocation for women’s rights, have not analysed the effectiveness of it nor provided information on its implementation strategy. Gender responsive budgeting is discussed and analysed in greater detail in chapter 3. Through applying that analysis, a better understanding of the concept and implementation challenges of gender responsive budgeting will be gained. This is key to understanding the supervisory role the African Commission could provide in their concluding observations.

2 2 4 1 *Reporting guidelines*

As indicated above, article 26(1) of the Maputo Protocol stipulates that states parties are obligated to submit state reports in accordance with article 62 of the ACHPR. In terms of the latter provision, state reports are due every two years and are required to set out the legislative or other measures taken in order to give effect to the rights in the ACHPR. These state reports give insight into how state parties have viewed their obligations in terms of the Maputo Protocol, specifically concerning resource

⁹⁸ Rule 74(3) of the Rules of Procedure.

⁹⁹ Budoo *The Role of Gender Budgeting* 214.

¹⁰⁰ Rule 74(2) of the Rules of Procedure.

allocation. State reports, in this way, should be a significant interpretative source for other state parties.¹⁰¹

The process of state reporting is considered a “forum for constructive dialogue” and enables the African Commission to monitor the implementation of the ACHPR and the Maputo Protocol.¹⁰² However, the state parties who have reported on resource allocation in terms of the Maputo Protocol, provide little guidance as to what they consider to be effective implementation. Therefore, the concluding observations of the African Commission are relevant. These indicate the African Commission’s response to state parties’ efforts, as well as how state parties are held accountable to the Maputo Protocol.

In terms of the Solemn Declaration on Gender Equality in Africa (“Solemn Declaration”), state parties committed to report annually on progress made in gender mainstreaming.¹⁰³ The Solemn Declaration was adopted in 2004 by member states of the AU to show their continued commitment and action towards achieving gender equality.¹⁰⁴ Thus, it is not a binding, legal document. Despite the commitment made to report annually on progress made in terms of the Solemn Declaration, state parties rarely report on the Solemn Declaration.¹⁰⁵

Despite the availability of reporting guidelines, there are still disparities in the structure and content of most state reports that have been submitted.¹⁰⁶ This provides problems for supervisory bodies because more work needs to be done in interpreting and analysing state reports. When state parties comply with the available guidelines, supervisory bodies are able to address key issues more efficiently because it is easier to pinpoint the necessary information relating to the promotion of women’s rights and resource allocation. States parties are required to report in two parts: part A reports on the ACHPR and part B on the Maputo Protocol.¹⁰⁷ However, many state parties

¹⁰¹ S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 106.

¹⁰² African Commission “State Reporting” (2019) *African Commission on Human and Peoples’ Rights* <<http://www.achpr.org/states/>> (accessed 07-07-2020).

¹⁰³ AU Assembly “Solemn Declaration on Gender Equality in Africa” (2004) Assembly/AU/Decl.12(III)Rev.1 para 12.

¹⁰⁴ LSE “Solemn Declaration on Gender Equality in Africa (SDGEA)” (2016) *LSE Centre for Women, Peace and Security* <<https://blogs.lse.ac.uk/vaw/sdgea/>> (accessed 11-11-2020) 1.

¹⁰⁵ 1

¹⁰⁶ Newsletter of the Special Rapporteur on the Rights of Women in Africa on the Occasion of the 30th Anniversary of the African Commission on Human and Peoples’ Rights 12.

¹⁰⁷ UP “Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” (2010) *UP* <http://www.chr.up.ac.za/images/researchunits/wru/documents/_gender_expert_meeting_state_reporting_guidelines.pdf> (accessed 07-07-2020).

conflate these two parts into one report. Many state reports, therefore, only refer to the Maputo Protocol or women's rights briefly in their ACHPR reports.¹⁰⁸ The risk of such a conflation is that state parties do not rigorously engage with women's rights. As such, the provisions in the Maputo Protocol may not get the necessary consideration.

In terms of the reporting guidelines, state parties are also obligated to provide general information on gender responsive budgeting.¹⁰⁹ The theory underlying gender responsive budgeting is, as mentioned above, discussed in Chapter 3. The Republic of Rwanda ("Rwanda") and the Republic of South Africa ("South Africa") have submitted state reports where the Maputo Protocol has been extensively addressed, and both countries have developed policies and reports on resource allocation or gender responsive budgeting. Thus, the individual state reports of these two countries are analysed in the following sub-section, as they, thus far, have contributed the most to the development of resource allocation for women's rights. There have been other state parties that have mentioned resource allocation for women's rights in their state reports. However, as there is very limited analysis or policy discussion pertaining to the issue in these state reports, they are not discussed further in this research.¹¹⁰

2 2 4 2 *Individual state reports*

2 2 4 2 1 Rwanda

Rwanda has submitted an initial report on the Maputo Protocol and has provided for the "mainstreaming of gender perspective" in their government programme by implementing gender responsive budgeting.¹¹¹ In terms of this programme, all

¹⁰⁸ UP "Panel Discussion on the State Reporting Obligations and Guidelines on Reporting under the Maputo Protocol" (2019) UP <https://www.up.ac.za/faculty-of-law/news/post_2807209-panel-discussion-on-the-state-reporting-obligations-and-guidelines-on-reporting-under-the-maputo-protocol> (accessed 07-07-2020).

¹⁰⁹ UP "Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2010) UP 2.

¹¹⁰ The other state parties which have addressed the Maputo Protocol or resource allocation for women's rights in state reports are Togo, Angola, The Democratic Republic of Congo and Namibia. They have been excluded from this discussion because of the lack of policy and analysis which accompanies the state reports. Thus, they would not contribute to the analysis of resource allocation in this research.

¹¹¹ Republic of Rwanda "The 11th, 12th and 13th periodic reports of the Republic of Rwanda on the implementation status of the African Charter on Human and Peoples' Rights & the Initial Report on the Implementation status of the Protocol to the African Charter on Human and People's Rights and the Rights of Women in Africa" (2016) <http://www.achpr.org/files/sessions/60th/state-reports/11th-16th-2009-2016/rwanda_11th_3th_periodic_report_eng.pdf> 73.

government budget agencies are required to submit “[g]ender [b]udget statements” with their complete budgets to the government.¹¹² These initiatives are reported to have started in 2003 with the aim to integrate gender equity into the country’s development agenda and process.¹¹³ However, the first initiatives were unsuccessful due to a lack of continuity.¹¹⁴ The government perceived the reasoning behind this to be that the Rwanda Minister of Finance and Economic Planning was not at the forefront of the programme. Instead, the United Kingdom’s Department for International Development led the initiative and its implementation.¹¹⁵ Stotsky et al conclude that gender responsive budgeting is proving to be most effective in countries where the ministers responsible for finance and economic planning are taking the lead.¹¹⁶

The second initiative commenced in 2008, which focused on building local capacity to implement gender responsive budgeting, instead of relying on international consultants.¹¹⁷ These initiatives were led by the Minister of Finance and Economic Planning. The initiatives started with the goal to increase gender responsive budget allocations in the health, education, agriculture, and infrastructure sectors.¹¹⁸ The approach to select pilot sectors was developed because of the comprehensive attention given to sectors where gender equality was lacking.¹¹⁹

Rwanda rolled out its gender responsive budgeting initiatives in three phases. This was first, to prepare an institutional framework with a core team and a steering committee; secondly to sensitise all layers of government, civil society and donors to the programme; and lastly to provide in-depth training and support to the pilot sectors.¹²⁰ These pilot sectors would again be health, education, agriculture and infrastructure. Stotsky et al submit that in the period following the implementation of

¹¹² 73.

¹¹³ Times Reporter “How gender responsive is the budget?” (15-04-2012) *The New Times* 1 <<https://www.newtimes.co.rw/section/read/54006>> (accessed 07-07-2020).

¹¹⁴ J G Stotsky, L Kolovich & S Kebhaj “Sub-Saharan Africa: A Survey of Gender Budgeting Efforts” (2016) *IMF Working Paper* 18.

¹¹⁵ 18.

¹¹⁶ 3.

¹¹⁷ 18.

¹¹⁸ O Kabaya “Presentation to “Gender in MENA Projects: Promoting Women’s Economic Empowerment, Tunisia” (2009) *Worldbank* <http://siteresources.worldbank.org/INTGENDER/Resources/336003-1244137886626/May21_OdetteKabaya_AnalyticalToolsGB.pdf> (accessed 07-07-2020) 7.

¹¹⁹ Stotsky et al (2016) *IMF Working Paper* 19.

¹²⁰ Kabaya “Presentation to “Gender in MENA Projects: Promoting Women’s Economic Empowerment” (2009) *Worldbank* 8.

gender responsive budgeting in Rwanda, females closed the gap with males in primary and secondary school enrolment and the maternal mortality ratio had significantly decreased.¹²¹

As stated in Rwanda's state report, this initiative would later be rolled out to all state sectors. This forms part of Rwanda's goals for gender responsive initiatives to ensure that all sectors understand the responsibility of addressing gender inequalities.¹²² To achieve this, five steps are recommended in Rwanda's Gender Budgeting Guidelines. These steps include, first, that each sector should conduct a situational analysis to collect gender-disaggregated data within the sector.¹²³ The second step is an assessment of the impact that all policies within that sector have on women's rights.¹²⁴ All sections of the budget need to be assessed with regard to cost and resources needed in the third step.¹²⁵ The fourth step is to monitor spending within that sector.¹²⁶ The fifth step is to require each sector to submit a gender budget statement through which the government can make comments and recommendations.¹²⁷ This ensures a unified approach to gender responsive budgeting as well as accountability for all sectors.¹²⁸ The unified gender budget statement forms part of the annual budget framework as required by Rwanda's Organic Budget Law.¹²⁹

According to the World Economic Forum, the Rwandan government is also a great example of how taxation revenue can be raised equitably and spent efficiently.¹³⁰ Rwanda has, through the combination of effective legislation and administration, managed to increase their taxation revenue by nearly 50% from 2001 to 2013.¹³¹ This significant increase in revenue is crucial when implementing Rwanda's Gender

¹²¹ Stotsky et al (2016) *IMF Working Paper* 23.

¹²² Republic of Rwanda, Ministry of Finance and Economic Planning "Gender Budgeting Guidelines" (2008) *MINECOFIN* 24
<https://migepr.gov.rw/fileadmin/_migrated/content_uploads/GENDER_BUDGETING_GUIDELINES-2.pdf> (accessed 07-07-2020).

¹²³ 24.

¹²⁴ 26.

¹²⁵ 26.

¹²⁶ 28.

¹²⁷ 28.

¹²⁸ Stotsky et al (2016) *IMF Working Paper* 24.

¹²⁹ No 12/2013/OL of 12/09/2013. Article 4 includes the achievement of gender-orientated goals as one of the six key principles of the legislation and article 32 requires a "gender budget statement" to form part of each year's budget framework paper.

¹³⁰ G Ghosh "Why Taxes will be Central to Africa's Development" (2016) *World Economic Forum* <<https://www.weforum.org/agenda/2016/05/why-taxes-will-be-central-to-africa-development/>> (accessed 07-07-2020).

¹³¹ 1.

Budgeting Guidelines and, in particular, positively impacted the capacity of health care spending.¹³²

2 2 4 2 2 South Africa

In its state report under the Maputo Protocol, South Africa specifically provided for gender responsive budgeting.¹³³ In this way, South Africa aims to ensure that “resources are deployed as a positive measure to equalise opportunities between men and women”.¹³⁴ In its 2015 state report, reference was made to its Women’s Budget Initiative, which had been running, in some form, since 1996. The early goals of this initiative were to develop doctrines which prioritise the socio-economic needs of poorer women, to develop a tool to monitor spending and to empower the Joint Standing Committee on Finance to supervise government spending.¹³⁵ Further goals of the initiative were to “empower government to take responsibility for drawing up gender sensitive budgets and to empower civil society”.¹³⁶

Following the Women’s Budget Initiative of 1996, the 2005 Women’s Budget Initiative was introduced which was considered a continuation of the previous initiative.¹³⁷ This initiative reiterated that the government has to adopt gender budgeting as a step to abide by its obligation to allocate resources to realise women’s human rights. This was done with the aim of highlighting the significance of mainstreaming gender into policies, programmes and plans. In an appraisal of gender responsive budgeting in South Africa, Chakraborty and Bagchi referred to South Africa as a “pioneer” in gender responsive budgeting.¹³⁸

The African Commission presented concluding observations on the state report of South Africa, however, no mention was made of the gender responsive budgeting

¹³² 1.

¹³³ Republic of South Africa “Combined Second Periodic Report under the African Charter on Human and People’s Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa” (2015) ACHPR <https://www.achpr.org/public/Document/file/English/staterep2_southafrica_2003_2014_eng.pdf>.

¹³⁴ 151.

¹³⁵ 151.

¹³⁶ 151. See also, D Budlender, D Elson, G Hewitt & T Mukhopadhyay *Gender Budgets Make Cents* (2002).

¹³⁷ Stotsky et al (2016) *IMF Working Paper* 25.

¹³⁸ LS Chakraborty & A Bagchi “Fiscal decentralisation and gender responsive budgeting in South African: An Appraisal” (2007) *Working Papers 07/45, National Institute of Public Finance and Policy*.

initiative.¹³⁹ This is concerning as the African Commission with regard to every state report, has, as mentioned above, an opportunity to raise awareness around the concept of gender responsive budgeting in its concluding observations.¹⁴⁰ This is especially acute when reference has been made to the allocation of resources for women's rights but no specific implementation plan is provided, as in South Africa's state report.

2 2 5 Special Rapporteur

In April 1998, the African Commission established the Special Rapporteur to address the challenges of women's human rights.¹⁴¹ The mandate of the Special Rapporteur includes assisting African states to develop and implement policies, which seek to promote and protect women's rights under the Maputo Protocol; as well as following up on the implementation of the Maputo Protocol.¹⁴² Where the Special Rapporteur deems it necessary, he or she can draft resolutions or intersession reports to the African Commission on the status of women's rights in Africa.¹⁴³ The first Special Rapporteur was appointed in 1999.¹⁴⁴

The Special Rapporteur has not yet presented any intersession reports to the African Commission where the interpretation or implementation of article 26(2) of the Maputo Protocol was directly addressed. The need for gender responsive budgets has only briefly been mentioned in some intersession reports but there was no reference made to article 26(2) or how these budgets should be implemented.¹⁴⁵ The Special

¹³⁹ African Commission on Human and Peoples' Rights "Concluding observations and recommendations on the combined second periodic report under the African Charter on Human and Peoples' Rights and the initial report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa" (2016) <http://www.achpr.org/files/sessions/20th-eo/conc-obs/2nd-2003-2014/co_combined_2nd_periodic_republic_of_south_africa.pdf>.

¹⁴⁰ Budoo *The Role of Gender Budgeting* 214. See part 2 2 4 1 above.

¹⁴¹ ACHPR "Special Rapporteur on the Rights of Women" (2018) *African Commission on Human and Peoples' Rights* <<http://www.achpr.org/mechanisms/rights-of-women/>> (accessed 07-07-2020).

¹⁴² ACHPR "About: Mandate and Biographical Notes" (2018) *African Commission on Human and Peoples' Rights* <<http://www.achpr.org/mechanisms/rights-of-women/about/>> (accessed 07-07-2020).

¹⁴³ Newsletter of the Special Rapporteur on the Rights of Women in Africa on the Occasion of the 30th Anniversary of the African Commission on Human and Peoples' Rights 5.

¹⁴⁴ ACHPR/res.38 (XXV) 99: Resolution on the Designation of the Special Rapporteur on the Rights of Women in Africa.

¹⁴⁵ Intersession Report of the Special Rapporteur on the Rights of Women in Africa presented during the 59th Ordinary Session of the African Commission (2016) <<https://www.achpr.org/sessions/intersession?id=245>> para 12; Intersession Report of the Special Rapporteur on the Rights of Women in Africa presented during the 58th Ordinary Session of the African Commission (2016) <<https://www.achpr.org/sessions/intersession?id=244>> para 15; Intersession Report of the Special Rapporteur on the Rights of Women in Africa presented during the 57th Ordinary

Rapporteur has however noted in a statement that “several countries” have established funds for women’s empowerment.¹⁴⁶ Side sessions have been held at the ordinary sessions of the African Commission where the Special Rapporteur has addressed guidelines for state reporting with regard to the Maputo Protocol. The Special Rapporteur, along with the Centre for Human Rights of the University of Pretoria, also developed guidelines for state reporting under the Maputo Protocol which was referred to above.¹⁴⁷

To promote the ratification and enforcement of the Maputo Protocol, the Special Rapporteur undertakes advocacy campaigns to African states.¹⁴⁸ These missions can entail fact-finding and women’s rights promotion. During such visits, the Special Rapporteur can also make recommendations to the state parties on how to increase the enjoyment of women’s rights in these states.¹⁴⁹ These missions could prove invaluable when combined with sessions on periodic reporting and best practices for resource allocation. The Special Rapporteur also organised the first Regional Conference of the Commission in 2010 in Mali.¹⁵⁰ This conference was entitled, “The Role of the African Commission in the Promotion and Protection of the Rights of Women in Africa” and the conference aimed to ensure the visibility of the Special Rapporteur.¹⁵¹ The procedures and protective mandate of the African Commission were emphasised and promoted.

2 3 Resource allocation under the ACHPR

Article 1 of the ACHPR states that state parties shall “adopt legislative or other measures” to realise the rights contained therein. There is, however, no other specific

Session of the African Commission (2015) <<https://www.achpr.org/sessions/intersession?id=189>> para 19: Intersession Report of the Special Rapporteur on the Rights of Women in Africa presented during the 56th Ordinary Session of the African Commission (2015) <<https://www.achpr.org/sessions/intersession?id=179>> para 25.

¹⁴⁶ Status of implementation of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. Commissioner, Special Rapporteur on the Rights of Women in Africa (African Commission on Human and Peoples’ Rights) (2016) New York, United States of America 12.

¹⁴⁷ UP “Guidelines for State Reporting under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” (2010) UP <https://www.up.ac.za/faculty-of-law/news/post_2807209-panel-discussion-on-the-state-reporting-obligations-and-guidelines-on-reporting-under-the-maputo-protocol>. See part 2 2 4 1 above.

¹⁴⁸ Newsletter of the Special Rapporteur on the Rights of Women in Africa on the Occasion of the 30th Anniversary of the African Commission on Human and Peoples’ Rights 6.

¹⁴⁹ 7.

¹⁵⁰ 6.

¹⁵¹ 6.

provision within the ACHPR which provides guidance as to how resources should be allocated and how it should be interpreted. Thus, as the analysis of the Maputo Protocol set out above highlighted, other sources of interpretation become relevant. The main sources will be communications to the African Commission by individuals and NGOs,¹⁵² the decisions on these communications and the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights (“Principles and Guidelines”).¹⁵³

2 3 1 African Commission Decisions on Communications

In *Social and Economic Rights Action Centre and Another v Nigeria* (“SERAC”)¹⁵⁴ the African Commission referred to the state parties’ obligations in terms of the ACHPR. The communication states that the military government of the state party had condoned and facilitated the operations of oil corporations in Ogoniland, in Nigeria.¹⁵⁵ These oil operations caused environmental degradation and health problems for the people residing in Ogoniland.¹⁵⁶ The complainant alleged a violation of articles 2, 4, 14, 16, 18(1), 21 and 24 of the ACHPR.¹⁵⁷

In this communication, the African Commission made it clear that state parties have a duty to “respect, protect, promote and fulfil” the rights in the ACHPR.¹⁵⁸ In terms of the duty to fulfil, the African Commission confirmed that this entails an allocation of resources that would lead to the realisation of these rights.¹⁵⁹ The African Commission furthermore stated that the state parties have an obligation to “take reasonable and other measures” to realise the right to a general satisfactory environment, favourable to development as set out in article 24 of the ACHPR.¹⁶⁰

¹⁵² The communications by NGOs and individuals are considered persuasive in nature but are, ultimately, non-binding. See Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 176.

¹⁵³ ACHPR “Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights” (2011) *African Commission on Human and People’s Rights* <http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf>.

¹⁵⁴ Communication 155/96 (2001).

¹⁵⁵ Para 1.

¹⁵⁶ Para 2.

¹⁵⁷ Right to non-discrimination, to integrity, to property, to health, to family, to free disposition of natural resources and to general satisfactory environment, respectively.

¹⁵⁸ SERAC Communication 155/96 (2001) para 44.

¹⁵⁹ Para 47.

¹⁶⁰ Para 52.

However, Chenwi argues that the African Commission failed in its obligation in that it neglected to elaborate on what constitutes reasonable steps.¹⁶¹ In the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (“Endorois”)¹⁶² Communication, the African Commission stated that the state party bears the burden of proving that a measure it has adopted is reasonable.¹⁶³ This decision considered the eviction of the Endorois people from their ancestral land to create a game reserve for tourism. The complainants alleged a violation of articles 8, 14, 17, 21 and 22 of the ACHPR.¹⁶⁴ This decision required the state party to prove that a restriction on these aforementioned rights, particularly the right to practice their religion on their ancestral land, was reasonable. The African Commission stated that it may, in some circumstances, be necessary for state parties to limit the rights in the ACHPR. However, they must be related and directly proportionate to the need being fulfilled through the restriction.¹⁶⁵

Thus, the African Commission has strengthened its jurisprudence through elaborating that state parties bear the burden of proof to show that an action has reasonably been taken and that rights have reasonably been limited. Chenwi argues further that the decision in *Endorois* would be beneficial to poor litigants who lack sufficient resources to prove unreasonableness on behalf of the state party.¹⁶⁶ This could be used in future litigation where state parties need to prove that their resource allocation for women’s rights, or lack thereof, has been reasonable. Subsequently, the *Endorois* decision elaborates on the “reasonable steps” as described in *SERAC*.¹⁶⁷

SERAC shows that there rests a positive duty on the state party to ensure that steps are taken to realise these rights despite apparent resource constraints. Thus, the African Commission expects state parties to fulfil its obligations in terms of the ACHPR even if there is a lack of available resources. In *SERAC* the African Commission stated that it did not wish to “fault governments that are labouring under difficult

¹⁶¹ L Chenwi “An Appraisal of International Law Mechanisms for Litigating Socio-Economic Rights, with a particular focus on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the African Commission and Court” (2011) 22 *Stell LR* 683 695.

¹⁶² Communication 276/03 (2010).

¹⁶³ Para 172.

¹⁶⁴ Right to religious practice, to property, to culture, to the free disposition of natural resources and to development, respectively.

¹⁶⁵ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication 276/03 (2010) para 172.

¹⁶⁶ Chenwi (2011) *Stell LR* 695.

¹⁶⁷ *SERAC* Communication 155/96 (2001) para 52.

circumstances to improve the lives of their people”.¹⁶⁸ However, in the African Commission’s own words, there is no right in the ACHPR that “cannot be made effective”.¹⁶⁹

In *Purohit and Moore v The Gambia* (“*Purohit*”)¹⁷⁰ the African Commission further grappled with resource allocation for mental health care under the ACHPR. The communication dealt with the poor conditions in The Gambia’s psychiatric health units as well as the effects of mental health legislation in The Gambia.¹⁷¹ The complainants alleged a violation of articles 2, 3, 5, 7(1)(a), 7(1)(c), 13(1), 16 and 18(4) of the ACHPR.¹⁷² In response, the African Commission read into article 16 of the ACHPR (right to health), an obligation to take “concrete and targeted steps” to realise this right.¹⁷³ This was after having due regard to the fact that many individuals were not enjoying the right to health because of resource constraints.

Amin argues that “concrete and targeted steps” incorporates the obligation on state parties to take immediate steps towards the progressive realisation of the right to health.¹⁷⁴ The African Commission concluded that state parties need to take “full advantage of its available resources”. Ssenyonjo adds that the concept of “progressive realisation subject to available resources” was thus read into article 16.¹⁷⁵ From this approach, it is possible to conclude that article 16(2) of the ACHPR creates an obligation on state parties to take defined steps in order to fully realise the right to health. A similar approach could prove useful under the Maputo Protocol.

Yeshanew, in his analysis of *Purohit* concludes that “[t]here is also nothing wrong with issuing remedies with resource implications, but the [African] Commission could have rationalized its recommendations with appropriate justifications and indication of more specific mode of execution”.¹⁷⁶ This reiterates the fact that while the African Commission is making progressive decisions regarding resource allocation, there still

¹⁶⁸ Para 69.

¹⁶⁹ Para 68.

¹⁷⁰ Communication 241/01 (2003).

¹⁷¹ Para 4.

¹⁷² Right to non-discrimination, to equality, to dignity, to appeal a case, to defence, to participate freely in government, to health and to special measures of protection for disabled people, respectively.

¹⁷³ *Purohit and Moore v The Gambia* Communication 241/01 (2003) para 84.

¹⁷⁴ A Amin *A teleological approach to the interpretation of socio-economic rights in the African Charter on Human and Peoples’ Rights* LLD Thesis, University of Stellenbosch (2017) 293.

¹⁷⁵ M Ssenyonjo “Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years Since the Adoption of the African Charter” (2011) 29 *Netherlands Quarterly of Human Rights* 358 387.

¹⁷⁶ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 174.

remains a lack of certainty around exact implementation. *Purohit* also showed that the African Commission is cognisant of resource constraints that many state parties face. It acknowledged that:

“[I]t is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right.”¹⁷⁷

This further highlights that the African Commission is mindful of the resource constraints that state parties face and that the realisation of these rights are resource intensive. This is, furthermore, a recognition of how poverty and scarce resources result in some African states not being able to facilitate the full enjoyment of the right to health.¹⁷⁸ However, despite this acknowledgement, the African Commission still made the decision that these rights need to be realised within the available resources of the state party. Yeshanew argues that the lack of implementation guidelines in relation to resource allocation could be attributed to the African Commission’s cognisance of resource constraints.¹⁷⁹

The analysis of the African Commission in *Purohit* and *SERAC* show that state parties have clear obligations when it comes to resource allocation in terms of the ACHPR. It is not enough for state parties to allege that resource constraints are hindering the realisation of rights. State parties need to take active steps to realise these rights. These communications are, as indicated by Mbazira, considered progressive because of the extensive way in which they protect the rights in the ACHPR.¹⁸⁰

2 3 2 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights

The African Commission has further elaborated on resource allocation in the Principles and Guidelines. These were created in accordance with article 45(1)(b) of

¹⁷⁷ *Purohit and Moore v The Gambia* Communication 241/01 (2003) para 84.

¹⁷⁸ Ssenyonjo (2011) *Netherlands Quarterly of Human Rights* 388.

¹⁷⁹ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 284.

¹⁸⁰ C Mbazira “Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights: Twenty Years of Redundancy, Progression and Significant Strides” (2006) 6 *AHRLJ* 358 348.

the ACHPR as they are “principles and rules aimed at solving legal problems relating to human and peoples’ rights”. The Principles and Guidelines were presented in 2011 after the African Commission presented its findings in *SERAC* and *Purohit*.

The Principles and Guidelines indicate that article 1 of the ACHPR requires state parties to “recognise” the rights, duties and freedoms in the ACHPR which should include budgetary measures.¹⁸¹ The African Commission further stated that these rights need to be made available “regardless of how this is achieved”.¹⁸² Amin, relying on a teleological methodology for interpreting the ACHPR, argues that article 1 of the ACHPR implicitly includes the notions of “progressive realisation” and “within maximum available resources” where it states “to adopt other measures”. She further argues that the phrase allows states to “take into account non-legislative measures, such as resource consideration, planning, and budgeting to realise the socio-economic rights in the African Charter [ACHPR].”¹⁸³ State parties are also obligated, in terms of the Principles and Guidelines, to allocate sufficient resources within national budgets to realise each right in the ACHPR.¹⁸⁴ These national budgets and national policies should also include an analysis of budget allocation and implementation.¹⁸⁵ The Principles and Guidelines state that the available resources that a state party has to its disposal include international assistance and cooperation.¹⁸⁶

The Principles and Guidelines also define the concept of progressive realisation within the context of economic, social and cultural rights. This refers to the “obligation to progressively and constantly move towards the full realisation of economic, social and cultural rights, within the resources available to a State, including regional and international aid”.¹⁸⁷ This concept requires state parties to implement a “reasonable and measurable plan” which prioritises the needs of “members of vulnerable and disadvantaged groups”.¹⁸⁸ The Principles and Guidelines also state that the minimum

¹⁸¹ ACHPR “Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights” (2011) *African Commission on Human and People’s Rights* <http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf> (accessed 07-07-2020).

¹⁸² Para 3(a).

¹⁸³ Amin *A teleological approach to the interpretation of socio-economic rights* 122.

¹⁸⁴ Principles and Guidelines para 18.

¹⁸⁵ Para 27.

¹⁸⁶ Para 20.

¹⁸⁷ Para 13.

¹⁸⁸ Para 14.

level of each of the economic, social and cultural rights in the ACHPR should always be met. This “obligation exists regardless of the availability of resources and is non-derogable”.¹⁸⁹ Durojaye states that the African Commission could have been inspired by the ICESCR when incorporating the concepts of progressive realisation and minimum core values into the Principles and Guidelines.¹⁹⁰ These concepts, in the context of the ICESCR, are analysed further in chapter 4.

The Principles and Guidelines elaborate further on the right to health¹⁹¹ which was addressed in both *SERAC* and *Purohit*.¹⁹² In terms of the Principles and Guidelines, states are obligated to set a target of allocating at least 15 per cent of their annual budget to the advancement of the national health sector.¹⁹³ Of the amount that makes up this 15 per cent, an adequate and appropriate portion must go to the authorities responsible for the fights against malaria, HIV/AIDS, tuberculosis and other related diseases. Other strategies laid out in the Principles and Guidelines, such as ensuring that National Poverty Reduction Strategies include specific plans to realise the right to health, are also resource intensive.¹⁹⁴ Thus, the Principles and Guidelines have provided more concrete implementation strategies regarding resource allocation for the right to health following the *SERAC* and *Purohit* communications.

As discussed above, the *SERAC* communication stated that “reasonable and other measures” were necessary to realise the right to a satisfactory environment in article 24 of the ACHPR.¹⁹⁵ The Principles and Guidelines elaborate on what this would entail. The Principles and Guidelines importantly include the right to water and sanitation as being implied in various articles in the ACHPR, including articles 4, 5, 15, 16, 22 and 24. To effectively realise this right, state parties need to implement resource-intensive measures such as comprehensive water strategies and responsible usage monitoring systems.¹⁹⁶

The Principles and Guidelines are not binding on state parties, nevertheless, they provide an interpretative tool for addressing economic, social and cultural rights

¹⁸⁹ Para 17.

¹⁹⁰ Durojaye (2017) *Global Jurist* 64.

¹⁹¹ Article 16 of the ACHPR

¹⁹² See part 2 3 1 above.

¹⁹³ Principles and Guidelines para 67(g).

¹⁹⁴ Para 67(j).

¹⁹⁵ *SERAC* Communication 155/96 (2001) para 52. See part 2 3 1 above.

¹⁹⁶ Principles and Guidelines para 92(g).

obligations within the ACHPR.¹⁹⁷ The non-binding nature is also evident in article 45(1)(b) of the ACHPR as “African Governments *may* base their legislations [emphasis added]” on these Principles and Guidelines. The Principles and Guidelines ensure that state parties understand their obligations in terms of economic, social and cultural rights. Durojaye describes the Principles and Guidelines as a “marking scheme to measure states’ commitments to their obligations to realise socioeconomic rights”.¹⁹⁸

2 4 Conclusion

The analysis in this chapter established that there has been no direct interpretation of article 26(2) of the Maputo Protocol by the supervisory bodies responsible for overseeing its implementation. The African Court has, in its jurisprudence, provided limited interpretation of the Maputo Protocol as a whole. The Maputo Protocol has also only been addressed in two cases before the African Court. *APDF* revealed how the African Court generated resource-intensive obligations derived from other provisions of the Maputo Protocol, without referring directly to article 26(2) of the Protocol. The African Commission has equally not analysed article 26(2) in any of its decisions, but has referred to it in General Comment 2 by stating that adequate resources need to be allocated to strengthen public health offerings.

The analysis of state reports filed under the Maputo Protocol established that state parties are unclear as to how resource allocation under the Maputo Protocol should be interpreted and very few referred to gender responsive budgeting initiatives in their state reports (as is required by reporting guidelines). Despite the glaring irregularities of the reporting, the content is also lacking with regard to resource allocation and gender responsive budgeting.

In addition, the interpretation of resource allocation under the ACHPR has been sparse and has not provided adequate guidance to state parties. The analysis of resource allocation under the ACHPR showed that the African Commission has made progressive decisions for the realisation of human rights. This is especially prevalent in the unwavering response to rights not being fully realised in the *SERAC* and *Purohit* decisions. This chapter presented that a lack of sufficient, rigorous interpretation of resource allocation under the Maputo Protocol, has led to discrepancies and gaps in

¹⁹⁷ Amin *A teleological approach to the interpretation of socio-economic rights* 373.

¹⁹⁸ Durojaye (2017) *Global Jurist* 65.

the guidance provided to state parties to fulfil their obligations under the Maputo Protocol.

Thus, there is a need for new interpretive and implementation guidelines for African countries on allocating resources to realise women's rights. Chapter 3 considers the role that feminist legal theory and gender responsive budgeting can play as a theoretical framework for resource allocation decisions. This analysis further considers the shortfalls in interpretation and implementation identified in this chapter through the lens of feminist legal theory.

CHAPTER 3: FEMINIST LEGAL THEORY AND GENDER RESPONSIVE BUDGETING: A THEORETICAL LENS

3 1 Introduction

Chapter 2 focused on the current interpretation of article 26(2) of the Maputo Protocol. It was shown that the supervisory organs of the Maputo Protocol have failed to develop a sufficiently rigorous interpretation of article 26(2). This has resulted in an inadequate normative framework guiding states parties in the fulfilment of their obligations under the Maputo Protocol. This chapter analyses the role that feminist legal theory and gender responsive budgeting can play as a theoretical lens in developing the interpretation of the obligations in article 26(2) of the Maputo Protocol to remedy some of the defects identified in chapter 2.

The research question guiding this chapter asks to what extent feminist legal theory and gender responsive budgeting can be used to assist in the interpretation of the resource allocation instruction under article 26(2) of the Maputo Protocol. The hypothesis aligned with this question is that feminist legal theory and gender responsive budgeting provides a comprehensive theoretical approach, which can assist in guiding the research in interpreting and evaluating state obligations relating to the resource allocation under the Maputo Protocol.

3 2 Feminist legal theory

Feminists seek “the empowerment of women and the transformation of institutions dominated by men”.¹⁹⁹ Feminist legal theory developed in the 1960s, during the

¹⁹⁹ MA Fineman “Feminist legal theory” (2005) 13 *Journal of Gender, Social Policy and the Law* 1 14.

second wave of the women's movement.²⁰⁰ One of the goals of feminist legal theory is to ensure that advocacy for women's rights is grounded in women's lived experiences.²⁰¹ Thus, the law needs to respond to existing patriarchal patterns within social relations and seek to redress them. This redress is especially necessary to rectify social inequalities between men and women.

Feminist legal theory has been categorised into three "waves" or "generations" which signify periods of intensive development.²⁰² Legal scholars use "waves" and "generations" interchangeably, however, for consistency, the term "generation(s)" will be used in this research. Chamallas points out that a defining characteristic of these generations is that they tend to respond to and criticise the preceding generation.²⁰³ She describes these three generations as the "generation of equality", the "generation of difference" and the "generation of complex identities".²⁰⁴

The first generation, which became prominent in the 1970s was characterised by the struggle to assert the similarities between men and women and to win equal rights.²⁰⁵ It was argued that, due to these similarities, men and women should enjoy equal access to benefits and opportunities in society.²⁰⁶ Thus, the "generation of equality" was coined.

During the 1980s, the second generation of feminism emerged, which was characterised by a recognition of the inherent differences between men and women. While the first generation emphasised the similarities between men and women, the second generation highlighted the importance of acknowledging the difference in men and women's histories and social standing. The focus of the second generation was to show how women were prevented from attaining substantive equality because of social and organisational structures that failed to consider gender differences.²⁰⁷ These gender differences included, for example, sexual and reproductive rights. Gender difference was analysed through its origins in cultural attitudes, ideology, discourse, and socialisation.²⁰⁸ Women and men could no longer be treated equally

²⁰⁰ M Chamallas *Introduction to Feminist Legal Theory* 3 ed (2013) 2.

²⁰¹ E Bonthus & C Albertyn *Gender, Law and Justice* (2007) 5.

²⁰² Chamallas *Feminist Legal Theory* 17.

²⁰³ 17.

²⁰⁴ 18.

²⁰⁵ 19.

²⁰⁶ 19.

²⁰⁷ 21.

²⁰⁸ 21.

as fought for in the first generation because the law had always catered for men. More extensive legal redress was thus needed.

The third generation of feminist theory emerged during the 1990s and is still developing today. This generation emphasised the complex identities that made up women, particularly where these identities create differences amongst women themselves.²⁰⁹ This is in contrast to the second generation where the difference between men and women was emphasised. The multiplicity among diverse women's lived experiences came to the forefront during the third generation. This included race, age, class, sexuality, culture, and religion.²¹⁰

The first and second generations have also been criticised and further developed through the third generation. Because of the extensive development of the third generation, the first and second generations are no longer relevant to a modern application of feminist legal theory. The third generation of feminist legal theory is where the concept of anti-essentialist feminist legal theory developed. Anti-essentialism is further discussed below.²¹¹

In the 1980s, feminist scholars started analysing legal structures that impeded justice for women instead of advancing it.²¹² Today, feminist legal theory is focused on analysing law in three ways: first, to identify sources of bias and injustice within it; secondly to utilise it in a way that advances justice for women within institutions and social practices; and thirdly, to identify and overcome systems of oppression and other barriers to reform.²¹³

A feminist perspective of the law is one that questions the application of legal rules with the ultimate objective of helping to craft a legal system that is empowering to all. This perspective specifically considers the impact that policy and the law have on women and whether such impact is detrimental to them. Through this constant questioning, the law is developed and strengthened. Furthermore, this questioning occurs specifically through the lens of women's experiences because of the law's patriarchal history. This questioning has become known as asking the "women

²⁰⁹ 23.

²¹⁰ The use of the terminology "diverse women" will have this meaning going forward in this research.

²¹¹ See part 3.3 below.

²¹² Smith "Four Themes in Feminist Legal Theory: Difference, Dominance, Domesticity and Denial" in *The Blackwell Guide to the Philosophy of Law and Legal Theory* 90.

²¹³ 90.

question”.²¹⁴ By asking the women question, the ways in which the law has failed to consider the lived experiences of diverse women can be identified and possibly rectified.²¹⁵ The application of feminist legal theory is, thus, twofold: first, it analyses the way in which the law is affecting and promoting women’s rights. Secondly, if the law is not effectively promoting women’s rights, the law must be “reworked” or re-evaluated.²¹⁶ Wishik describes feminist jurisprudential inquiry as follows:

“Feminist jurisprudence ... inquires into the politics of law. Yet feminist jurisprudential inquiry focuses particularly on the law’s role in perpetuating patriarchal hegemony. Such inquiry is feminist in that it is grounded in women’s concrete experiences. These experiences are the source of feminism’s validity and its method of analysis. Feminist inquiry involves the understanding and application of the personal is political. ... We who wish to look at law and society from the point of view of all women’s experience may help ensure our ability to see from that point of view by collectivising our process of inquiry. This may mean both asking questions which by their scope are careful to be inclusive of all women’s experience and working collectively with other women in the formulation and exploration of our questions [emphasis added].”²¹⁷

Wishik’s description thus ensures that the feminist legal inquiry is inclusive of all women’s lived experiences. However, the guiding voices during the first and second generations of feminist legal theory have been white, Western, middle-class women. This has created tensions between white feminists and feminists of colour. The third generation of feminist legal theory is thus grounded in ensuring the law remains inclusive of all women who face varying degrees of discrimination. In so doing, legal responses seek to empower and protect all women.

Wishik states that feminist jurisprudence can “help us envision the world we wish to create”.²¹⁸ Because it is necessary to consider present social inequalities as well as how to redress them, Bonthuys and Albertyn concur with this idea and conclude that any feminist legal inquiry needs to be “concerned with both the law as it is, as well as the law as it ought to be”.²¹⁹ Van Marle and Bonthuys suggest that we can redefine

²¹⁴ KA Bartlett “Feminist Legal Methods” (1990) 103 *Harvard Law Review* 829 837.

²¹⁵ 837.

²¹⁶ R Amollo *Women’s Socio-Economic Rights in the Context of HIV and AIDS in South Africa: Thematic Focus on Health, Housing, Property and Freedom from Violence* LLD dissertation, University of the Western Cape (2011) 80.

²¹⁷ HR Wishik “To Question Everything: The Inquiries of Feminist Jurisprudence” in K Weisberg (eds) *Feminist Legal Theory: Foundations* (1993) 22 25.

²¹⁸ 26.

²¹⁹ Bonthuys & Albertyn *Gender, Law and Justice* 5.

existing legal dilemmas by placing women's experiences at the centre of our legal reasoning.²²⁰

Within the context of the Maputo Protocol, Budoo argues that it reflects feminist legal theory in Africa.²²¹ Particularly because it is aimed at the promotion of women and the redress of patriarchal systems that seek to impede the advancement of women's rights.²²² To ensure that this inquiry is grounded in the inclusivity of all African women's experiences, this research will utilise this third generation of feminist legal theory. Particular attention will be paid to the anti-essentialist strand of feminist legal theory to identify how the theory could be best used to interpret and implement the Maputo Protocol.

3 3 Anti-essentialist feminist legal theory

3 3 1 The relevance of anti-essentialism in interpreting the Maputo Protocol

The theory underlying this research needs a lens through which to view and aim to redress the discrimination that diverse African women continuously face. Africa, being a vast continent with diverse inhabitants and countries, has many differing, yet intersecting human rights issues. Women face gender inequality as well as intersecting forms of discrimination on grounds such as age, economic status, racial or ethnic background, religion, nationality, citizenship, marital status, health, HIV/AIDS status or disability, poverty, and sexual orientation among others.²²³ These intersecting grounds can compound the discrimination that women face.²²⁴ Tamale suggests that the varied backgrounds of Africans stem from the diverse socio-cultural circumstances as well as the political differences in each region.²²⁵ Africa also has a vast number of different cultural and religious practices (including Christianity, Islam, and many different African traditional religions) which impact the way women and other intersecting factors, such as sexuality, are viewed. Differing customary practices, cultures, and religions affect the way that women are treated in society as well as in

²²⁰ Van Marle & Bonthuys "Feminist Theories and Concepts" in *Gender, Law and Justice* 46.

²²¹ Budoo *The Role of Gender Budgeting* 120.

²²² 120.

²²³ AU "Women's Rights in Africa" (2017) *Office of the United Nations High Commissioner for Human Rights* 16.

²²⁴ AU "Women's Rights in Africa" (2017) *Office of the United Nations High Commissioner for Human Rights* 16.

²²⁵ S Tamale "Exploring the Contours of African Sexualities: Religion, Law and Power" (2014) 14 *African Human Rights Law Journal* 150 151.

the household. It also affects their sexual and reproductive rights, including gender identity and sexuality.²²⁶ De Vos describes writing about the complexity of Africa as “precarious” because of the vastness and diversity of the continent.²²⁷

As Africa is such a diverse continent, it stands to reason that African women also share its complexity. Chiwara points out that in Africa, women still bear a disproportionate burden of poverty, non-monetised care work, discriminatory land ownership, discriminatory inheritance rights as well as limited access to education and adequate health care services.²²⁸ The burden of poverty and a lack of education are frequently connected. Families facing severe poverty often need to decide whom to send to school, and often it is the girl child who has to stay at home and help the family.²²⁹ Thus, the cycle of African women in poverty, having diminished access to education and carrying the weight of non-monetised care work, continues.²³⁰ Therefore, gender equality in Africa is a complex issue that cannot be solved without understanding the intersecting issues faced by African women. The differences among African women are so significant when attempting to understand their lived experiences that it has been described as “substantive diversity”.²³¹ Gender equality in Africa consequently requires an understanding of the complexities of the lived experiences of African women.

Chirwa argues that the only way to achieve gender equality is through substantive equality.²³² Formal equality requires people to be treated the same without taking into consideration their different contexts.²³³ Substantive equality requires laws and policies to take into consideration women’s lived experiences and patriarchal customs

²²⁶ 175.

²²⁷ P de Vos “The Limit(s) of the Law: Human Rights and the Emancipation of Sexual Minorities on the African Continent” in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) 1 1.

²²⁸ L Chiwara “Situating the Maputo Protocol in Key Issues: Changing the narrative for women in Africa” in AU “Women’s Rights in Africa” (2017) *Office of the United Nations High Commissioner for Human Rights*

<https://www.ohchr.org/Documents/Issues/Women/WRGS/WomensRightsinAfrica_singlepages.pdf> 20 (accessed 07-07-2020).

²²⁹ G Mutume “African women battle for equality” (2005) *African Renewal* <<https://www.un.org/africarenewal/magazine/july-2005/african-women-battle-equality>> (accessed 07-07-2020).

²³⁰ Non-monetised care work is further discussed in parts 4 2 3 1 and 4 3 1 6 below.

²³¹ V Collis-Buthelezi & D Higginbotham “Introduction: Imagining Intersections: Sexuality, Gender, Law, and the Politics of Solidarities” in D Higginbotham & V Collis-Buthelezi *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) xi xvi.

²³² D Chirwa “Reclaiming (Wo)manity: The Merits and Demerits of the African Protocol on Women’s Rights” (2006) 53 *Netherlands International Law Review* 63 88.

²³³ 89.

that disempower women.²³⁴ The United Nations Special Rapporteur on Violence Against Women avers that substantive equality can only be achieved through laws and policies specifically designed to advance women's rights, and not through gender-neutral measures.²³⁵ Discrimination and gender inequality can occur even when law and policy are seemingly gender neutral. For example, aid programmes that benefit the "head of the household" tend to directly disadvantage women since men are considered the head of the house in many cultures.²³⁶

A 2017 AU Report on Women's Rights in Africa affirms that the Maputo Protocol promotes substantive equality.²³⁷ The Maputo Protocol advocates for equality that can only be achieved through a holistic understanding of the context of African women and a redistribution of resources.²³⁸ Only when policies and measures implemented by state parties take into consideration these intersecting grounds of discrimination, can substantive equality be achieved.²³⁹ The Maputo Protocol thus requires state parties to take active steps to realise substantive equality.²⁴⁰

Rebouché argues that the Maputo Protocol incorporates various understandings of feminist legal theory that have been expressed in other women's rights instruments over the years.²⁴¹ However, the relevance of anti-essentialist feminist legal theory is the main focus of this research. Africa is a vastly diverse continent, requiring legal solutions that are responsive to these diversities. Nyanzi concludes that "feminist ... knowledge in Africa must use innovative stylistics to capture the imagination and thinking of its consumers in order to undo normative and often oppressive modes of thought and knowing".²⁴² These solutions need to be cognisant of the multiplicity of women which includes race, age, class, sexual orientation, disability, culture and other factors, as mentioned above. Tamale acknowledges that the "African renaissance or

²³⁴ M Sjöholm *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* (2018) 34.

²³⁵ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, UN Doc No A/HRC/26/38 (28 May 2014) para 61.

²³⁶ 15.

²³⁷ AU "Women's Rights in Africa" (2017) *Office of the United Nations High Commissioner for Human Rights*.

²³⁸ Chirwa (2006) *Netherlands International Law Review* 89.

²³⁹ 19.

²⁴⁰ Viljoen (2009) *Wash & Lee J Civ Rts & Soc Just* 23.

²⁴¹ R Rebouché "Health and Reproductive Rights in the Protocol to the African Charter: Competing Influences and Unsettling Questions" (2009) 16 *Wash & Lee J Civ Rts & Soc Just* 79 96.

²⁴² S Nyanzi "Afterword: Sexing the Law and Legislating Gendered Sexualities" in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) 66 67.

the transformation that we are striving for” will only be realised when the gap between the different voices seeking justice and equality is closed.²⁴³ The struggle for gender equality in Africa cannot stand in isolation from these other intersecting issues.

3 3 2 Critiques of essentialism

Anti-essentialism was born out of criticism of the essentialism of the second generation of feminist legal theory.²⁴⁴ This gender essentialism refers to the assumption that there is a commonality between all women, such as oppression by men, which needs to be addressed through feminism.²⁴⁵ Furthermore, it postulates that all women share the “same inherent characteristics”.²⁴⁶ This leads to an over generalisation of women’s struggles from the perspective of only some groups of women.²⁴⁷

Bartlett describes anti-essentialism as “internal criticism” against feminist theory itself.²⁴⁸ Chamallas also described essentialism as an “internal enemy” which has the potential to “tarnish feminist-inspired reforms, rendering them inadequate to meet the needs of large numbers of women”.²⁴⁹ Van Marle and Bonthuys consider essentialism as a “pitfall” by regarding women as “sharing an ahistorical, uncontextualised feminine identity”.²⁵⁰ Anti-essentialism is thus a critical component of the third generation because of the inclusive way women’s diverse lived experiences are brought to the forefront of feminist legal theory.

Anti-essentialism also forms an important part of post-modern and intersectional feminist theory. Post-modern and intersectional feminism are strands of feminist legal theory that emerged in the third generation and are still developing today. Post-modern feminism contends that individuals do not have fixed identities but rather have an identity that is “continuously constructed in different contexts by competing discourses”.²⁵¹ Intersectional feminism examines how multiple factors of one’s being intersect to create distinctive forms of discrimination.²⁵² Crenshaw developed the

²⁴³ S Tamale “Introduction” in S Tamale (ed) *African Sexualities: A Reader* (2011) 1 4.

²⁴⁴ Chamallas *Feminist Legal Theory* 23.

²⁴⁵ 24.

²⁴⁶ J Wong “The Anti-essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond” (1999) 5 *William & Mary Journal of Women and the Law* 273 275.

²⁴⁷ Chamallas *Feminist Legal Theory* 93.

²⁴⁸ KT Bartlett “Gender Law” (1994) 1 *Duke Journal of Gender Law & Policy* 1 15.

²⁴⁹ Chamallas *Feminist Legal Theory* 29.

²⁵⁰ Van Marle & Bonthuys “Feminist Theories and Concepts” in *Gender, Law and Justice* 38.

²⁵¹ 38.

²⁵² Chamallas *Feminist Legal Theory* 24.

concept of intersectionality and characterised it as a complex system of simultaneous areas of oppression and disempowerment that can affect a person.²⁵³ Post-modern and intersectional feminism are broader theories of feminism, of which anti-essentialism is an integral strand.

Harris is considered one of the first scholars to apply an anti-essentialist philosophy to feminist legal theory. She describes essentialism as a “notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience”.²⁵⁴ She warns that gender essentialism, while intellectually convenient to the feminist movement, can pave the way for unconscious racism.²⁵⁵ It places “white women on the throne of essential womanhood”.²⁵⁶ As argued by Minow, the unifying expression of women helps to categorise experience, even to the detriment of denying the experiences of some women.²⁵⁷ Essentialism, thus, has the potential to oversimplify the diverse experiences of women.

Bartlett has identified some of the problems created by essentialism. The first is false generalisations or universalisms. This operates through a “particular privileged norm – that of the white, middle class, heterosexual woman” being presupposed and therefore, ignoring other characteristics that construct a woman’s identity.²⁵⁸ Another problem that Bartlett describes as “gender imperialism” arises from overemphasising sex as a basis of discrimination and so diminishing other grounds of disempowerment.²⁵⁹ These issues can become particularly prevalent when the law is interpreted and applied in ways that do not take into account the different contexts of the women whose situations it aims to improve.

In essence, anti-essentialist scholars argue that the issue of “sameness” or “difference” does not only separate men and women but also women and women.²⁶⁰ Feminist legal theory seeks to put women, as a category, at the forefront of the legal inquiry, while anti-essentialism asks who this woman is and how the law empowers

²⁵³ See K Crenshaw “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1991) 43 *Stanford Law Review* 1241.

²⁵⁴ AP Harris “Race and Essentialism in Feminist Legal Theory” (1990) 42 *Stanford Law Review* 581 585.

²⁵⁵ 589.

²⁵⁶ 603.

²⁵⁷ M Minow “Feminist Reason: Getting It and Losing It” (1988) 38 *Journal of Legal Education* 51.

²⁵⁸ Bartlett (1994) *Duke Journal of Gender Law & Policy* 15.

²⁵⁹ 16.

²⁶⁰ Williams (1991) *Duke Law Journal* 299.

this particular woman. Women have multiple complex identities that Chamallas describes as follows:

“The intersectional commitment requires feminists to consider the different social positions of various subgroups of women and to appreciate that some women may experience distinctive forms of discrimination or escape harm altogether. It also leads to the uncomfortable realisation that women can and do oppress other women. Like men, women can be privileged because of their race, class, or other social advantage and can use that privilege to injure others.”²⁶¹

Women undoubtedly have multiple identities, and any one or combination of these identities such as race or gender can give rise to discrimination. These identities are also indivisible. As expressed by Harris, for women who also face racial discrimination, “the experience of self is precisely that of being unable to disentangle the web of race and gender – of being enmeshed always in multiple, often contradictory, discourses of sexuality and color”.²⁶² Wong, however, criticises Harris for focusing her analysis of anti-essentialism on black women.²⁶³ Nevertheless, while the experiences of black women were central to Harris’ argument, it was used to illustrate how essentialism can oversimplify women’s experience of discrimination. Feminist legal theory should not only reflect the experiences of a subgroup of women. Harris reiterates that a move to anti-essentialism would not threaten feminism itself. Instead, feminists would “begin to attack racism and classism and homophobia” together under the banner of feminist legal theory.²⁶⁴

Anti-essentialism will be the main lens through which the Maputo Protocol will be interpreted given its ability to respond to women’s diverse realities and identifies in Africa. While anti-essentialist feminist legal theory has been identified as the most appropriate theory by which to guide this research, it is necessary to also consider criticisms of the theory. This research will remain cognisant of these criticisms to ensure that the research is not hindered or blind to potential shortcomings.

²⁶¹ Chamallas *Feminist Legal Theory* 7.

²⁶² Harris (1990) *Stanford Law Review* 604.

²⁶³ Wong (1999) *William & Mary Journal of Women and the Law* 289.

²⁶⁴ Harris (1990) *Stanford Law Review* 612.

3 3 3 Critiques of anti-essentialism

Wong argues that anti-essentialism is mainly criticised because, through trying to define the various complexities of a woman's identity, anti-essentialist authors fall into an essentialist trap themselves.²⁶⁵ By attempting to capture and explain all the complexities and multiple identities that make up a woman, another "essential woman" is being created. Wong suggests that this will also be the case regardless of how "women" is defined or interpreted.²⁶⁶

Another criticism of anti-essentialism is that, by focusing on this array of complex identities, we potentially move away from feminist legal theory and women's rights.²⁶⁷ This could be considered as distancing the analysis from the aim of feminist legal theory, towards the protection of human rights in general. Wong argues that essentialism is unavoidable because "there is always a need to define the category of 'woman'" that we are trying to empower and protect.²⁶⁸

However, despite the potential problems that anti-essentialism could create, Wong remains optimistic that an anti-essentialist feminist legal theory could constitute a useful analytical tool. She states that all feminist legal theory should be cognisant of the essentialism and anti-essentialism debate.²⁶⁹ In so doing, a theorist is able to understand all aspects of the debate as well as the possible pitfalls. These pitfalls are particularly prevalent when trying to define the category, "women" which also, inadvertently, privileges a particular type of woman.²⁷⁰

Consequently, when applying anti-essentialist feminist legal theory, we need to ensure that the inquiry is focused on the diverse circumstances of all women and the way that different identities and experiences intersect and affect women's lived realities. The inquiry needs to remain focused on the experiences of all women and, in particular, the women who are directly affected in the context of the particular law being analysed. Oloka-Onyango and Tamale argue that in order to ensure that the theory being applied is effective, there is a need for a common foundation binding

²⁶⁵ Wong (1999) *William & Mary Journal of Women and the Law* 291.

²⁶⁶ 292.

²⁶⁷ 291.

²⁶⁸ 292.

²⁶⁹ 295.

²⁷⁰ 296.

together the social movement – in this case, women.²⁷¹ Charlesworth similarly argues that the strength of the feminist message lies in the generality of women, although the particular circumstances of women need to be analysed and applied in specific contexts.²⁷² Thus, to realise the rights of the collective, attention needs to be paid to the particular circumstances of women.²⁷³

Particular care must be taken to ensure that the interpretation and application of the Maputo Protocol are responsive to the diversity of women's experiences of oppression in Africa. Harris refers to the application of anti-essentialist feminist legal theory as a "creative struggle that reflects a multiple consciousnesses."²⁷⁴ The use of anti-essentialism to realise the rights in the Maputo Protocol is one of the creative ways in which it can be applied. Particularly, how anti-essentialism can influence the development of gender responsive budgeting. The following part includes an analysis of gender responsive budgeting as a practical application of feminist legal theory. Particular attention will be paid to how states parties can meet their obligations in terms of article 26(2) of the Maputo Protocol through gender responsive budgeting.

3 4 Gender responsive budgeting

3 4 1 The significance of budgeting for human rights

As reiterated throughout this research, resources are integral to the realisation of human rights. All human rights, whether civil, political, economic, social, or cultural, can only be effectively protected through public funds which are efficiently allocated to the relevant sector.²⁷⁵ Thus, the relationship between resource allocation and human rights is critical. The substantive realisation of human rights makes "demands on public finance well beyond what is required for the basic administration of justice".²⁷⁶ These

²⁷¹ J Oloka-Onyanga & S Tamale "The Personal is Political,' or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism" (1995) 17 *Human Rights Quarterly* 691 697.

²⁷² H Charlesworth "Talking to Ourselves? Feminist Scholarship in International Law" in S Kouvo & Z Pearson (eds) *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (2011) 17 24.

²⁷³ Sjöholm *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* 34.

²⁷⁴ Harris (1990) *Stanford Law Review* 616.

²⁷⁵ I Saiz "Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective" in A Nolan, R O'Connell & C Harvey (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (2013) 77 78.

²⁷⁶ D Elson, R Balakrishnan & J Heintz "Public Finance, Maximum Available Resources and Human Rights" in *Human Rights and Public Finance* 13.

resources include human, technological, organisational, natural, informational and financial resources.²⁷⁷ The realisation of human rights, thus, create obligations for state parties in terms of the drafting and effective implementation of national budgets and public policies.²⁷⁸ Resource allocation by governments plays a vital role in the realisation of human rights. As noted by the Office of the UN High Commissioner for Human Rights:

“On a day-to-day basis, governments fulfil their human rights obligations through developing and implementing well-thought-out policies, plans, institutions, and budgets – ones that hold the promise of being effective – and then assessing them to determine whether they have, in fact, been successful in realizing people’s rights”.²⁷⁹

The allocation of resources through budgets and policy reflects the government’s values and priorities.²⁸⁰ Thus, states which prioritise the advancement and protection of women’s rights need to reflect that in their resource allocation decisions. The national, provincial and local budgets and policies could be described as indicating one way in which governments intend to further human rights.²⁸¹ Thus, it is possible to consider state budgets and policies to assess whether these states will meet their human rights obligations.²⁸² Similarly, state parties need to mobilise resources to meet their obligations in terms of the Maputo Protocol and to realise women’s rights.

States are not able to meet their obligations in terms of the treaties they have ratified without the mobilisation of resources. Thus, gender responsive budgeting, as a way for state parties to meet their obligations in terms of article 26(2) of the Maputo Protocol is considered.²⁸³ To do this, it is necessary to first evaluate the relation between feminist legal theory and gender responsive budgeting. In particular, gender responsive budgeting as an application of anti-essentialist feminist legal theory will be integral to the discussion.

²⁷⁷ 39.

²⁷⁸ J Kuosmanen “Human Rights, Public Budgets, and Epistemic Challenges” (2016) 17 *Hum Rights Rev* 247 248.

²⁷⁹ United Nations Human Rights: Office of the High Commissioner *Realizing Human Rights Through Government Budgets* (2017) 11.

²⁸⁰ A Quinn “Equality Proofing the Budget: Lessons from the Experiences of Gender Budgeting” in A Nolan, R O’Connell & C Harvey (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (2013) 164.

²⁸¹ Budoo *The Role of Gender Budgeting* 16.

²⁸² 17.

²⁸³ See part 3 4 3 below.

3 4 2 Gender responsive budgeting as a response to feminist legal theory

While budgeting is essential for state parties to meet their human rights obligations, gender responsive budgeting is integral for states to fulfil their obligations in relation to women's rights. Since the main aim of gender responsive budgeting is to ensure that state parties meet their obligations to mobilise resources for the realisation of women's rights, it can be considered a "manifestation of feminist legal theory".²⁸⁴ However, the reach of gender responsive budgeting is broader than simply protecting women. The term "gender" refers to all socially constructed identities, attributes, roles and power relationships as a result of the social and cultural significance attached to the biological differences between men and women.²⁸⁵ Thus, gender responsive budgeting has the potential to address gender-based discrimination, which includes the promotion and empowerment of women. Some gender budgeting frameworks discussed in this chapter only refer to the promotion of women, without acknowledging gender relations.²⁸⁶

Gender responsive budgeting was the outcome of a long struggle by feminists to have women's needs reflected in every aspect of the budgeting process.²⁸⁷ Gender responsive budgeting can thus actualise the commitments of feminist legal theory. By implementing gender responsive budgeting initiatives, states acknowledge the significance of the work of women's rights activists and theorists.

This section considers whether gender responsive budgeting can constitute a viable tool for interpreting and implementing article 26(2) of the Maputo Protocol. Gender responsive budgeting has been established as an effective way for states to meet their obligations in terms of CEDAW.²⁸⁸ The use of gender responsive budgeting in other international instruments, including CEDAW, is further analysed in chapter 4. This analysis assists in establishing best practices for effectively realising women's rights through resource allocation.

²⁸⁴ Budoo *The Role of Gender Budgeting* 121.

²⁸⁵ CEDAW Committee, General Recommendation 28 *Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women* (2010) UN Doc CEDAW/C/GC/28 para 5 ("General Recommendation 28").

²⁸⁶ This issue will be addressed further in chapter 5 when a new interpretative framework for resource allocation for the realisation of the rights in the Maputo Protocol will be developed.

²⁸⁷ 118.

²⁸⁸ Elson *UNIFEM Budgeting for Women's Rights* 32.

It will be shown, through the analysis of gender responsive budgeting implementation, that the main concepts of gender responsive budgeting are not directly aligned with anti-essentialist feminist legal theory.²⁸⁹ As argued above, anti-essentialist feminist legal theory represents the optimal theoretical framework for interpreting the Maputo Protocol.²⁹⁰ Few gender responsive budgeting initiatives implement elements of anti-essentialist feminist legal theory. However, Elson discusses anti-essentialism in the taxation systems of revenue frameworks for gender responsive budgeting.²⁹¹

A misconception of budgeting for the realisation of women's rights is that a singular budget, aimed at women, should be created. A singular "women's budget" does not reflect an understanding that women's rights should be integrated into all aspects of government policy. However, many feminist theories argue that a general budgetary reform aimed at realising the rights of all women will eventually filter down to realise the rights of the most marginalised groups of women.²⁹² An anti-essentialist feminist legal theory approach to gender responsive budgeting would call for a holistic analysis of all government budgets to ensure that differently situated groups of women are considered at every stage of state planning, policy and budgets. Gender responsive budgeting has the potential to ensure that feminist legal theory is practically implemented, and women's rights are realised effectively.²⁹³

3 4 3 Definition and purpose of gender responsive budgeting

Gender responsive budgeting as a concept was developed in Australia in the 1980s. It forms part of gender mainstreaming. Gender mainstreaming has been defined as the "reorganisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and all stages, by the actors normally involved in policy-making".²⁹⁴ Gender responsive budgeting seeks to raise awareness within government of the impact of budgets and

²⁸⁹ See part 3 4 5 below.

²⁹⁰ See part 3 3 above.

²⁹¹ See part 3 4 5 below.

²⁹² H Eisenstein *Inside Agitators: Australian Femocrats and the State* (1996) 119. See also part 3 3 3 above.

²⁹³ Chapter 5 proposes a framework of gender responsive budgeting which has a stronger connection to anti-essentialist feminist legal theory.

²⁹⁴ Council of Europe *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices* (2004) 15.

social policies on women, to keep government accountable to gender equality goals, and to facilitate reforms to improve the socio-economic status of women.²⁹⁵ Each level of government had to assess their individual budget to determine what the effect was on women and girls and if there were any achievements in terms of gender equality.²⁹⁶ Various countries have since implemented this approach as a means to realise gender equality. The Council of Europe has described gender responsive budgeting as:

“[A]n application of gender mainstreaming in the budgetary process. It means a gender-based assessment of budgets, incorporating a gender-perspective at all levels of the budgetary process and restructuring revenues and expenditures in order to promote gender equality.”²⁹⁷

This definition, as argued by Budoo, identifies the key objectives of gender responsive budgeting.²⁹⁸ It assesses public policy and budgeting through a gender-oriented lens in order to ensure that resources are effectively allocated to realise women’s human rights.²⁹⁹ Such gender-sensitive public budget analysis is likely to promote better outcomes in terms of the realisation of women’s rights at all levels of government policy.³⁰⁰ It accordingly offers an optimal methodology for interpreting, implementing and assessing states parties’ obligations in terms of article 26(2) of the Maputo Protocol.

Another definition of gender responsive budgeting is that of the Southern African Development Community Guidelines on Gender Responsive Budgeting (“SADC Guidelines”).³⁰¹ The SADC Guidelines contain a definition that is more cognisant of the intersection of gender with race, class and age.³⁰² It states that “further categories of inequality” need to be considered when developing a gender responsive budget.

²⁹⁵ Elson *Budgeting for Women’s Rights* 39.

²⁹⁶ D Budlender & G Hewitt *Engendering Budgets: A Practitioners’ Guide to Understanding and Implementing Gender-Responsive Budgets* (2003) 10.

²⁹⁷ Council of Europe *Gender Budgeting: Conceptual Framework, Methodology and Presentation of Good Practices* (2005) 10.

²⁹⁸ Budoo *The Role of Gender Budgeting* 6.

²⁹⁹ Elson *Budgeting for Women’s Rights* 10.

³⁰⁰ Quinn “Equality Proofing the Budget: Lessons from the Experiences of Gender Budgeting” in *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* 167.

³⁰¹ The SADC Guidelines are not binding on member states, however, they are discussed in this thesis because of the interpretative value they add to gender responsive budgeting frameworks in Africa. It is also noted that the member states have suspended the SADC Tribunal. Individuals and NGOs are thus not able to challenge these guidelines or gender responsive budgeting initiatives at the SADC level.

³⁰² Southern African Development Community (2014) 14.

The SADC Guidelines emphasise the fact that gender responsive budgeting needs to be integrated into all public finance and economic policy and not merely constitute a separate budget aimed at women's rights.³⁰³

By mainstreaming gender responsiveness into all spheres of a country's public finance policies, women's rights can be strengthened in all relevant areas, including education for girls, reproductive health, gender equality in the workplace, the recognition of non-monetised care work and domestic violence. This mainstreaming would not be possible if gender responsive budgeting relied exclusively on a definition that ignored intersecting grounds of inequality and discrimination. Gender responsive budgeting thus encompasses the theory of anti-essentialist feminist legal theory by ensuring that state budgets include a gender perspective that is cognisant of intersecting forms of inequality and discrimination. However, the current expenditure implementation strategies for gender responsive budgeting do not adequately reflect the intersecting issues of inequality and discrimination.³⁰⁴ The current expenditure strategies only refer to how budgets need to be formulated to empower women and not how different groups of women would require individualised budgetary allocations. This issue will be further addressed in chapter five when a new interpretative framework for resource allocation under the Maputo Protocol will be developed.

As the SADC Guidelines state, an important aspect of gender responsive budgeting is that it is not simply about dividing a state's budget 50-50 for men and women or about creating a separate budget exclusively for the promotion of women. Instead, as Budlender and Hewitt point out, all government budgets are analysed "from a gender perspective to assess how it will address the different needs of women and men, girls and boys."³⁰⁵ In this way, gender responsive budgeting would also ensure better substantive equality outcomes for women. This, in turn, requires state parties to contextualise gender responsive budgeting in terms of the assessment of gender equality within that country. Thus, each state will need to establish how their gender responsive budgets should be effectively designed and managed to ensure that resources are allocated to meet the needs of women within their region.

Gender responsive budgeting initiatives can serve multiple purposes which include improving the allocation of resources to women, supporting gender mainstreaming in

³⁰³ 14.

³⁰⁴ See part 3 4 5 below.

³⁰⁵ Budlender & Hewitt *Engendering Budgets* 7.

macroeconomics, encouraging civil society participation in government policy planning, strengthening the link between economic and social policy goals, and tracking government expenditure against gender and development policy obligations.³⁰⁶

Another major advantage of gender responsive budgeting is that it enhances accountability and transparency of the state's policies. The SADC Guidelines draw particular attention to the international commitments that state parties have and how gender responsive budgeting should be used as a tool to achieve the "gender-specific benchmarks and targets".³⁰⁷ Gender responsive budgeting can be used as a yardstick for governments to ascertain whether they are meeting their obligations to fulfil women's rights.³⁰⁸ The SADC Guidelines also refer to gender responsive budgeting's role in exposing areas where states' policies are "gender-blind".³⁰⁹ When policies and laws are gender-blind, they cannot advance substantive gender equality due to their lack of responsiveness to the particular needs and situations of different groups of women. Gender-blindness could be exposed by asking how policies affect different groups of women.³¹⁰ Once problematic areas are exposed as being gender-blind, state parties can rectify these patterns by creating policies that are cognisant of the fact that the differing needs of men and women influence how these policies affect them.³¹¹

3 4 4 Civil society's role in gender responsive budgeting

The gender responsive budgeting process in Africa can greatly benefit from the participation of NGOs dedicated to gender issues as well as the participation of civil society. The term civil society refers to a "range of groupings in society that participate in some way in public life".³¹² Civil society accordingly includes NGOs as well as "professional associations, research and policy centres, philanthropic foundations, community-based groups ... the media, business organisations and trade unions".³¹³ When examining the gender responsive budgeting process, civil society should

³⁰⁶ 14.

³⁰⁷ SADC *Guidelines* 20.

³⁰⁸ Budlender & Hewitt *Engendering Budgets* 7.

³⁰⁹ SADC *Guidelines* 19.

³¹⁰ See part 3 2 above.

³¹¹ 19.

³¹² Budlender & Hewitt *Engendering Budgets* 54.

³¹³ 54.

include NGOs focused on gender related issues, such as sexual and reproductive health, education for girls, and domestic violence to name a few.

As previously indicated, gender responsive budgeting originated in Australia.³¹⁴ It has been argued that one of the main reasons why government took limited action to implement gender responsive budgeting effectively in Australia was because pressure from civil society was weak.³¹⁵ Hence, civil society involvement can have a significant impact on the implementation and effectiveness of a country's gender responsive budgeting initiative. The budgetary process can also be seen as a social development mechanism because of the involvement and possible training of civil society at every phase.³¹⁶ State parties are also encouraged to report on the involvement of civil society in the preparations of state reports on the Maputo Protocol to the African Commission.³¹⁷ By including civil society in the reporting guidelines to state parties of the Maputo Protocol, the African Commission recognises the significant impact these organisations can have on state parties' realisations of women's rights.³¹⁸

The involvement and engagement with civil society can help ensure adherence to the principles of human rights. These principles include participation, accountability, non-discrimination, transparency, human dignity, empowerment and the rule of law (informally referred to as the "PANTHER" principles).³¹⁹ These principles are not effective in isolation and are often more effective when a combination of the principles are being utilised.³²⁰ Yeshanew has described the use of the human rights principles as a "paradigm shift in the understanding of development as a multidimensional

³¹⁴ See part 3 4 3 above.

³¹⁵ Budlender & Hewitt *Engendering Budgets* 58.

³¹⁶ Training Manual on Human Rights Based Approaches to Governance and Development (2015) Kenya National Commission on Human Rights 44 <<https://www.knchr.org/Portals/0/GeneralReports/Training%20Manual%20on%20Human%20Rights%20Based%20Approaches%20to%20Governance%20and%20Development.pdf?ver=2018-06-06-200843-310>> (accessed 07-07-2020).

³¹⁷ UP "Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2010) UP 1.

³¹⁸ See chapter five part 5 3 1 below for a further discussion on the involvement of NGOs and civil society in the gender responsive budgeting process.

³¹⁹ B Ekwall & M Rosales "A Human Right Obligations and Responsibilities: PANTHER" (2009) 5 *Food and Agriculture Organization of the United Nations* <http://www.fao.org/docs/up/easypol/772/rtf_panther_233en.pdf> (accessed 07-07-2020). See chapter four part 4 3 2 2 below for a further discussion on the PANTHER principles and their application to spending resources to realise economic, social and cultural rights.

³²⁰ H Katsui, EM Ranta, S A Yeshanew, GM Musila, M Mustaniemi-Laakso & A Sarelin *Reducing Inequalities: A Human-Rights-based Approach in Finland's Development Cooperation with Special Focus on Gender and Disability* (2014) 21.

improvement in people's capability to lead lives that they value".³²¹ Essential to a human rights-based approach should be the focus on marginalised groups.³²² More efficient and quality outcomes can then be anticipated from the process.

While all the principles apply to gender responsive budgeting, participation and accountability have been identified as being crucial to a successful gender responsive budgeting initiative.³²³ Participation is relevant at all stages of the budgetary process and it is particularly prevalent during the initial stages of information gathering for resource allocation. Participation during the initial stages ensures that civil society has direct access to information and decision-making power in determining budgetary allocations.³²⁴ In order for accountability to be effective, there needs to be transparency in relation to budgetary processes and the evaluation of outcomes.³²⁵ When that is achieved, civil society is able to ensure that governments meet their obligations in terms of gender equality. The principle of non-discrimination is also essential to a successful gender responsive budgeting initiative. Yeshanew notes that the principle of non-discrimination should be read alongside the principle of participation.³²⁶ Adherence to the principle of non-discrimination will ensure that women enjoy equal participation in decision making and management.

The participation of civil society and NGOs in the budgeting process can have a positive impact on the greater public sector budgeting capacity.³²⁷ Krafchik argues that civil society has a crucial role to play at all stages of the budget process, including the drafting stage, the legislative stage, the implementation stage, and the auditing stage.³²⁸ Some of the benefits of civil society being involved throughout the budget process are that the budget debate is well-rounded, that there is an independent critical analysis of government activities, that new information is brought to the budget

³²¹ S Yeshanew "Introduction to the Human Rights-Based Approach" in *Exploring the Human Rights-Based Approach in the Context of the Implementation and Monitoring of the SSF Guidelines Workshop Proceedings* (24-26 October 2016) Rome, Italy 5 6.

³²² 6.

³²³ A Norton & D Elson *What's Behind the Budget? Politics, Rights and Accountability in the Budget Process* (2002) 40.

³²⁴ 42.

³²⁵ 41.

³²⁶ Yeshanew *Exploring the Human Rights-Based Approach in the Context of the Implementation and Monitoring of the SSF Guidelines Workshop Proceedings* (24-26 October 2016) Rome, Italy 83.

³²⁷ W Krafchik "Can Civil Society Add Value to Budget Decision-Making?" in United Nations Development Fund for Women *Gender Budget Initiatives: Strategies, Concepts and Experiences* (2002) 70 74.

³²⁸ 75.

decision-making table and that accountability is increased.³²⁹ However, it has been more common for civil society to merely analyse government budgets, once they have been published, in order to present government with potentially problematic areas.³³⁰ This is due to the closed nature of the budgetary process in many countries.³³¹ Due to the lack of opportunities for participation in the budgetary process, civil society will only be able to analyse the budget once it has been published and entered the implementation stage.

Another barrier experienced by many women and gender-based NGOs in participating effectively in the budgetary process is the requirement for certain skills in economic analysis and development.³³² These technical skills can place a restriction on which NGOs and community groups are able to actively participate and influence national budgets. There are also other skills, such as negotiation and advocacy skills, which could hinder the participation of women in any stage of the budgetary process.³³³ Despite these potential barriers, Budlender and Hewitt argue that the required skills could be advantageous to some NGOs and community groups because it provides the opportunity for collaboration and partnerships with groups that they have not traditionally been associated with.³³⁴

When considering civil society in Africa, it is also necessary to mention the significance of grassroots initiatives. The term “grassroots” is considered a loose term for citizens living in generally rural, poor areas or informal settlements.³³⁵ Bamanyaki and Holvoet theorise that NGOs can play a two-pronged role in targeting district level actors and grassroots community members.³³⁶ At a district level, female councillors and technocrats can be trained to analyse government gender responsive budgets as well as basic training on the most prominent issues that affect women.³³⁷ At the grassroots level, community members (mainly women) can be educated and mobilised on gender, advocacy and health issues, as well as local government

³²⁹ 74.

³³⁰ Budlender & Hewitt *Engendering Budgets* 54.

³³¹ Krafchik “Can Civil Society Add Value to Budget Decision-Making?” in United Nations Development Fund for Women 74.

³³² Budlender & Hewitt *Engendering Budgets* 60.

³³³ 52.

³³⁴ 60.

³³⁵ 62.

³³⁶ P Bamanyaki & N Holvoet “Integrating theory-based evaluation and process tracing in the evaluation of civil society gender budget initiatives” (2016) 22 *Evaluation* 72 79.

³³⁷ 79.

planning and budget processes.³³⁸ These initiatives will increase the awareness and understanding of gender responsive budgeting at the grassroots level as well as facilitate governments' accountability to community members. There is also a need to ensure a diverse group of women form part of the budget initiative. This will guarantee a diverse range of ideas and representation throughout the process.

The involvement of civil society and an application of human rights principles are thus paramount to an effective gender responsive budgeting initiative with better quality outcomes. Some implementation strategies for gender responsive budgeting already include elements of participation and accountability.³³⁹ These principles will be used in chapter 5 as a basis for proposing a framework for state parties to meet their obligations in terms of article 26(2) of the Maputo Protocol.

3 4 5 Gender responsive budgeting implementation strategies

Different views exist on what constitutes optimal strategies for implementing gender responsive budgeting. However, there are some basic implementation frameworks that are considered the basis of all gender responsive budget initiatives.³⁴⁰ This research will consider those that are most relevant to the African context. In so doing, best practices can be determined and utilised to create a framework that is likely to result in the most effective realisation of women's rights in the Maputo Protocol. The implementation frameworks on gender responsive budgeting that are discussed include those that were developed by Sharp, Budlender, Elson and the one developed within the SADC.

Sharp's three broad goals for an effective gender responsive budgeting initiative,³⁴¹ as well as her three-way categorisation of expenditure,³⁴² are discussed because of their relevance and use within most gender responsive budgeting initiatives. The expenditure strategies that are discussed include the SADC Guidelines' entry points for finance ministers to implement gender responsive budgeting, the five-step

³³⁸ 79.

³³⁹ See part 3 4 5 below.

³⁴⁰ Budlender et al *Gender Budgets Make Cents* 110.

³⁴¹ R Sharp & R Broomhill "Budgeting for Equality: The Australian Experience" (2002) 8 *Feminist Economics*.

³⁴² R Sharp "Gender Responsive Budgets: The Australian Experience" (2000) Paper prepared at the *International Workshop on Gender Auditing of Government Budgets*, Rome: 15-16 September 52.

approach described by Budlender,³⁴³ and the budget cycle framework developed by Elson.³⁴⁴ Budlender's analysis of taxation and her revenue strategy is then added.³⁴⁵

Sharp formulated three broad goals within the context of Australia's original gender responsive budgeting initiative. These goals have since been developed to a set of phases to effectively implement a gender responsive budgeting initiative. These three goals include awareness, accountability, and change.³⁴⁶ Awareness refers to identifying the inequities within a given sector of the budget that is being analysed. The aim is to make gender disparities more visible.³⁴⁷ Accountability then takes it further by ensuring that not only the budget is considered, but rather all the policies surrounding that sector as well as the strategic and performance plans.³⁴⁸ The final goal is change or acting. This refers to an actual alteration in that sector's budget and policies which is, as argued by Sharp, the ultimate objective of gender responsive budgeting.³⁴⁹

These goals are broad enough to be incorporated into any gender responsive budgeting initiative. Sharp's strategy has been widely applied as the baseline framework for gender responsive budgeting strategies. The AU, for example, applied Sharp's work within their Strategy for Gender Equality and Women's Empowerment.³⁵⁰ The AU utilised Sharp's strategy by casting a gender responsive spotlight on their mainstream expenditure as well as proposing general alterations which would promote gender equality on a continental, regional and national level.³⁵¹ These alterations included the involvement of women in gender equality management and planning teams.³⁵²

Sharp has further described the three-way categorisation of expenditure which is based on the initial Australian Women's Budget initiatives. The first category is

³⁴³ Budlender & Hewitt *Engendering Budgets* 92.

³⁴⁴ D Elson "Gender Responsive Budget Initiatives: Some Key Dimensions and Practical Examples" in United Nations Development Fund for Women *Gender Budget Initiatives: Strategies, Concepts and Experiences* (2002) 15 18.

³⁴⁵ Budlender & Hewitt *Engendering Budgets* 103.

³⁴⁶ Sharp & Broomhill *Feminist Economics* 32.

³⁴⁷ 34.

³⁴⁸ 38.

³⁴⁹ 41.

³⁵⁰ AU "AU Strategy for Gender Equality and Women's Empowerment: 2018-2028" (2018) AU <https://au.int/sites/default/files/documents/36195-doc-au_strategy_for_gender_equality_womens_empowerment_2018-2028_report.pdf> (accessed 07-07-2020).

³⁵¹ 55.

³⁵² 55.

“gender-targeted expenditure”.³⁵³ This is expenditure which has been particularly targeted to women’s or men’s individual needs.³⁵⁴ This could include women’s health programmes or domestic violence counselling for men and women. The second category is “equal opportunity expenditure for civil servants”.³⁵⁵ This would include spending by government agencies on their employees for initiatives such as parental leave or childcare facilities for children of employees.³⁵⁶ The third, and final, category is “mainstream budget expenditures which are assessed for their gendered impact”.³⁵⁷ This would include an analysis of who would be the main users of certain goods and services such as primary health care and agricultural support services.

This categorisation’s main purpose is to illuminate where most government’s spending is going and how it can be optimised. As set out by Budlender, when state parties focus on the first category, they have missed the point of gender responsive budgeting.³⁵⁸ Instead, there should be a focus on category three, which considers the government budget holistically to establish the impact that it has on gender equality.

Budlender has furthermore identified two potential problems with Sharp’s categorisation. The first is that the focus on women (in category one) could prove detrimental if the goal of gender equality is not at the forefront of the study.³⁵⁹ This could manifest, for example, in situations where expenditure on family planning is focused on controlling women’s bodies.³⁶⁰ Thus, the structural gender relations which disadvantage women need to play a central role in gender responsive budgeting initiatives.³⁶¹

Another potential weakness of Sharp’s categorisation is that there is no reference to revenue. However, as further pointed out by Budlender, this could be as a result of the vast differences in revenue between developed and developing countries.³⁶² Thus, a framework for revenue would not be broadly applicable. Despite the differences in revenue experienced by developed and developing countries, tax policies still need to be designed in a way that supports substantive gender equality. An effective

³⁵³ Sharp *International Workshop on Gender Auditing of Government Budgets* 63.

³⁵⁴ 63.

³⁵⁵ 63.

³⁵⁶ 63.

³⁵⁷ 63.

³⁵⁸ Budlender et al *Gender Budgets Make Cents* 110.

³⁵⁹ 110.

³⁶⁰ 110.

³⁶¹ See part 3 4 2 above where gender relations are discussed.

³⁶² 110.

framework for revenue policies which are gender responsive is, thus, a crucial part of gender responsive budgeting initiatives.

In addition, the SADC Guidelines provide what they refer to as “entry points” for state parties to implement gender responsive budgeting at a domestic level. These have been divided into entry points for the ministers responsible for finance and the ministers responsible for gender.³⁶³ This discussion focuses on strategies for finance ministers because they have direct access and influence over national budget allocations. These guidelines are specifically directed at the SADC member states.³⁶⁴ However, they could have relevance in other African states.³⁶⁵

The SADC guidelines provide five entry points for ministers of finance. The first of these is creating systems which ensure that gender responsive budgeting is well institutionalised at the initial phases of planning and programming.³⁶⁶ This stage includes promoting initiatives by other committees or ministers to include gender-specific strategies within their budgets.³⁶⁷ The SADC Guidelines emphasise that this first entry point should be considered a continuous process within any state parties’ planning and organisation processes.³⁶⁸ This process should also include coaching by expert consultants or NGOs within the country to ensure that the strategies are supported by the latest information and context-specific data.³⁶⁹ These consultants or NGOs could represent women’s interest groups or have knowledge about economic and budgetary planning. The involvement of NGOs and community groups in this process ensures that the human rights principle of participation is integrated at the beginning of the budgetary process. This entry point is one that can be applied to any state party because it encourages planning and learning about programmes that would best serve a specific region.

The second entry point provided for by the SADC Guidelines is to integrate gender equality in expenditure frameworks and macroeconomic models.³⁷⁰ This entry point

³⁶³ SADC *Guidelines* 31.

³⁶⁴ The SADC member states include Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia, and Zimbabwe. See Southern African Development Community “Member States” (undated) SADC <<https://www.sadc.int/member-states/>> (accessed 07-07-2020).

³⁶⁵ No other African regional group has released gender responsive budgeting guidelines.

³⁶⁶ SADC *Guidelines* 31.

³⁶⁷ 32.

³⁶⁸ 31.

³⁶⁹ 33.

³⁷⁰ 34.

also requires state parties to acknowledge that their current budgets and macroeconomic models may contain gender-blindness and that these should be identified.³⁷¹ This includes the variable of the non-monetised care economy. Gender responsive budgeting emphasises that non-monetised care work in the home is usually performed by women. This time spent performing non-monetised care work needs to be considered in policy assessments and economic models.³⁷² This work includes cooking, shopping, childcare, care for the elderly and odd jobs.³⁷³

By including this work, the SADC Guidelines conclude that state parties will have a clearer idea of how men and women spend their time in relation to the absence and presence of certain services or interventions.³⁷⁴ The CEDAW Committee, through their general recommendations, has also urged state parties to use time-use studies to measure the non-monetised care work that women do and include them in the national budgets.³⁷⁵ Elson suggests that economists need to start viewing non-monetised care work as paid work within their policies, to provide the recognition that is needed.³⁷⁶ The inclusion of non-monetised care work is particularly prevalent considering these activities are central to low-income African countries.³⁷⁷ Extensive work has been done by the CEDAW Committee and the CESC on non-monetised care work. This is further discussed and analysed in chapter 4.³⁷⁸

The third entry point is developing gender-sensitive budget call circulars.³⁷⁹ This refers to the finance ministers who need to send out budget call circulars to local government at the beginning of the fiscal year. These circulars should include policy priorities and frameworks that are gender sensitive and aid in the implementation of national gender responsive budgeting.³⁸⁰ This will ensure that the gender responsive budgeting goals and aims are implemented at every level of government. It will also

³⁷¹ 34.

³⁷² 35.

³⁷³ Non-monetised care work is further discussed and defined in chapter four part 4 2 2 5 below.

³⁷⁴ 35.

³⁷⁵ CEDAW Committee General Comment 17: *Measurement and Quantification of the Unremunerated Domestic Activities of Women and their Recognition in the Gross National Product* UN Doc HRI/GEN/1/Rev.6 (2003).

³⁷⁶ W Harcourt "Strengthening Local Economies through Gender Responsive Budgeting / Interview with Diane Elson" (2010) 53 *Development* 308 308.

³⁷⁷ L Messac "Women's unpaid work must be included in GDP calculations: lessons from history" (20-06-2018) *The Conversation* <<http://theconversation.com/womens-unpaid-work-must-be-included-in-gdp-calculations-lessons-from-history-98110>> (accessed 07-07-2020).

³⁷⁸ See parts 4 2 5 2 and 4 3 3 2 below.

³⁷⁹ SADC *Guidelines* 36.

³⁸⁰ 38.

express an unambiguous commitment to gender responsive budgeting as well as providing for uniformity within implementation.

Producing and delivering gender-sensitive budget speeches is the fourth entry point.³⁸¹ This entry point ensures a clear articulation of the state parties' commitment to gender responsive budgeting at all levels of government. A gender-sensitive budget speech should also include clear strategies as to how the government intends to achieve these substantive gender equality results through their budgeting process.³⁸²

The fifth, and final, entry point as set out by the SADC Guidelines is integrating gender into performance contracts.³⁸³ This entry point is designed to act as an accountability mechanism for state parties. If these contracts are entered into with other ministries, departments, NGOs or agencies, they can be held accountable to the gender responsive budgeting goals they set for themselves.³⁸⁴ When states enter into these contracts, they commit themselves to key activities and goals that will be achieved within a fiscal year.

Budlender has similarly developed five steps for the implementation of gender responsive budgeting. These five steps consider the value of gathering information about gender disparity. This framework has been used by African countries such as South Africa, Tanzania, and Uganda, but was initially developed for South Africa's gender budgeting initiative.³⁸⁵ The first step is analysing the situation of women and men.³⁸⁶ Through this analysis and fact-finding, the context of the specific region can be accurately understood so that gender responsive budgeting initiatives will take into account the specificities of that region.³⁸⁷ This step provides an opportunity for participation from civil society and NGOs in information gathering

The second step is assessing the gender responsiveness of all government policies.³⁸⁸ This step aims to assess whether a particular policy is increasing gender inequality or decreasing it.³⁸⁹ Some state parties may already have gender policies in place, in which case these policies would be at the forefront of this assessment

³⁸¹ 38.

³⁸² 38.

³⁸³ 39.

³⁸⁴ 39.

³⁸⁵ D Budlender *South African Women's Budget Initiative and Gender Education and Training Network* (2000) Money Matters: Workshop Materials on Gender and Government Budgets GETNET.

³⁸⁶ Budlender & Hewitt *Engendering Budgets* 92.

³⁸⁷ 97.

³⁸⁸ 97.

³⁸⁹ 97.

required by step two. However, even if there are no specific gender policies, it is important to examine the mainstream policies of the state party in order to detect their potential impact on gender equality goals.³⁹⁰

The third step is assessing budget allocations.³⁹¹ This step is directly linked with the second step because if the second step reveals that policies are adversely affecting substantive gender equality, then the third step can reveal to what extent funds are being misallocated.³⁹² Along with step two, the third step should be used to ascertain where funds are currently being allocated and what the effectiveness of these allocations have been. Step three could also be considered alongside Budlender's step four which is monitoring the spending and service delivery.³⁹³ The results from monitoring the spending and service delivery would be able to get a clearer picture of where funds are being allocated and where they are possibly being allocated ineffectively. The monitoring of poor service delivery would, thus, be able to illuminate where the focus of the budget needs to be directed.

The fifth, and final, step is assessing the outcomes.³⁹⁴ This step is crucial to any effective gender responsive budgeting initiative. The step provides for reflection to ensure that the desired outcomes are being met. If gender equality goals are not being met, there is an opportunity to rework and rectify the initiative. Thus, the final step allows for constant improvement of the programme, as well as the programmes being monitored against its initial purpose for the improved rights of women.

In a similar vein, Elson presents a framework for relating budgets to their impact on gender equality. This could be implemented within a specific province, department, or governmental programme.³⁹⁵ The framework assesses the financial inputs, activities financed, outputs delivered and impacts on people's wellbeing.³⁹⁶ The inputs consist of the money collected within a certain ministry or programme. This analysis would include exactly which groups of society are bearing the disproportionate burden of direct and indirect taxation. The activities consist of the services that were planned and delivered. The outputs consist of the actual planned and delivered utilisation of

³⁹⁰ 98.

³⁹¹ 99.

³⁹² 99.

³⁹³ 99.

³⁹⁴ 101.

³⁹⁵ Elson "Gender Responsive Budget Initiatives" in *Gender Budget Initiatives: Strategies, Concepts and Experiences* 18.

³⁹⁶ 18.

the services rendered. This could include how many patients were treated in medical facilities or how much taxes were collected. The impact refers to the planned and actual achievement in relation to the broader goals of gender equality. This could be the number of healthy people who benefitted from medical facilities.

The next part of Elson's framework entails applying a gender analysis to each of these dimensions to determine who is benefitting from each dimension of inputs, activities, outputs and impacts.³⁹⁷ The gaps in gender equality need to be identified and as well as any policy changes that need to be made in order to optimise the budgetary framework for gender equality.³⁹⁸ This information then needs to be conveyed to the appropriate ministry or governmental department in order to bring about the desired change to budgetary and policy decisions.³⁹⁹ A framework like this can be easily applied to different states and governmental organisations. This framework can also be utilised by NGOs and civil society to hold government accountable to gender equality goals, thus making it a convenient gender responsive budgeting initiative.

The above strategies, apart from Elson's framework, only address the expenditure side of gender responsive budgets. A crucial part that needs to be considered is how countries mobilise their resources and raise revenue in order to implement their gender responsive budgets. Most gender responsive budgeting implementation strategies only provide information on expenditure strategies. As stated above, Budlender believes the reasoning for this is the large disparity between the taxation revenue of developing and developed countries.⁴⁰⁰

Thus, there are fewer lessons that can be learned from the taxation experiences of different countries, as opposed to the expenditure strategies.⁴⁰¹ However, Budlender adapted her five-step strategy for expenditure to apply to taxation.⁴⁰² This was done by considering direct and indirect taxation, which forms the basis for a country's revenue.⁴⁰³ Budlender suggests that this process would involve considering national

³⁹⁷ 19.

³⁹⁸ 19.

³⁹⁹ 19.

⁴⁰⁰ Budlender & Hewitt *Engendering Budgets* 102.

⁴⁰¹ 102.

⁴⁰² 103.

⁴⁰³ 102.

and local taxes which are imposed on individuals, companies and goods and services.⁴⁰⁴

First, the situation of diverse men and women needs to be considered in respect of how taxation affects their lives.⁴⁰⁵ This includes considering how employment status, consumption patterns, income levels and government-funded goods and services impact the way taxation is paid.⁴⁰⁶ Secondly, the taxation policy at both the national and local levels are to be analysed in terms of how this may affect different groups of men and women.⁴⁰⁷ Thirdly, consideration should be given to how much tax has been collected in recent years compared to the expected amount to be collected.⁴⁰⁸ The analysis of amounts of taxation collected would also need to be compared to the current year and the future gender responsive budgeting strategies. Finally, in terms of Budlender's taxation analysis, it is necessary to determine and estimate, if necessary, how much of each category of taxes were paid by women.⁴⁰⁹ The final phase involves determining which groups of women were the most affected by certain categories of taxation.

Different forms of taxation affect groups of men and women differently.⁴¹⁰ Direct tax, such as income tax, affect men more than women because of their increased involvement in the formal labour market, more senior positions and higher incomes.⁴¹¹ Elson argues that in order to achieve substantive equality, taxation systems need to be cognisant of women's unequal access to the labour market.⁴¹² Taxation policies that perpetuate traditional roles for men and women, such as "breadwinner" and dependant, need to be reassessed and brought in line with the goals of gender responsive budgeting.⁴¹³ Women are also generally more prominent in non-monetised care labour that does not have income or income tax. The final phase in Budlender's taxation strategy applies principles of anti-essentialism as consideration needs to be given to which groups, particularly which groups of women, carry the disproportionate burden of taxation. Indirect tax may appear neutral because they are attached to

⁴⁰⁴ 103.

⁴⁰⁵ 103.

⁴⁰⁶ 103.

⁴⁰⁷ 103.

⁴⁰⁸ 103.

⁴⁰⁹ 103.

⁴¹⁰ 102.

⁴¹¹ 102.

⁴¹² Elson *Budgeting for Women's Rights* 33.

⁴¹³ 33.

goods and services, however, these taxes have a greater impact on poor people.⁴¹⁴ Lower-income groups spend a higher percentage of their income on consumable goods and, thus, pay a higher share of their income on indirect tax such as value added tax. Women are also disproportionately represented among the poor and make higher contributions to household consumables compared to men.⁴¹⁵ Budlender theorises that pressure could therefore be alleviated from women and the poor if direct taxes are increased.⁴¹⁶

These different strategies of implementing gender responsive budgeting illustrate that there is no one correct and accepted framework. The strategies also show that there is very little consideration given to the lived experiences of diverse women. Thus, anti-essentialist feminist legal theory currently has limited application in gender responsive budgeting. The purpose of this chapter is to discuss the most commonly used strategies, both in Africa and globally. These strategies are further applied to develop an interpretative framework for article 26(2) of the Maputo Protocol in chapter 5.

3 5 Conclusion

This chapter sought to establish that feminist legal theory and gender responsive budgeting provide a comprehensive theoretical approach, which can assist in guiding the interpretation and evaluation of state obligations relating to the resource allocation under the Maputo Protocol. This was achieved by showing that anti-essentialist feminist legal theory has a specific contextual application to the Maputo Protocol because of the inclusion of the lived experiences of the large diversity of women in Africa in its analysis.

Gender responsive budgeting is an initiative which resulted from feminist legal theory. The contrasting definitions and purposes of gender responsive budgeting illustrated how the mainstreaming of prominent issues that women face in every aspect of a state budget is required. The various strategies of gender responsive budgeting were discussed and shown to have far-reaching relevance and application. However, the strategies of gender responsive budgeting are lacking application of anti-essentialism feminist legal theory. There is the potential for further development of

⁴¹⁴ Budlender & Hewitt *Engendering Budgets* 103.

⁴¹⁵ See part 3 3 1 above.

⁴¹⁶ Budlender & Hewitt *Engendering Budgets* 104.

anti-essentialist legal theory and its relevance in the gender responsive budgeting frameworks.

The following chapter analyses how international human rights treaty bodies, specifically the CESCR and CEDAW, approach the task of interpreting the obligations of state parties to mobilise and allocate resources towards the fulfilment of the rights protected in the relevant treaties. These experiences of other human rights treaty bodies can illuminate emerging interpretative practices on resource allocations for human rights and thereby assist in developing a framework for the interpretation and implementation of article 26(2) of the Maputo Protocol.

CHAPTER 4: RESOURCE ALLOCATION UNDER CEDAW AND THE ICESCR

4 1 Introduction

Chapter 3 of this research considered feminist legal theory and gender responsive budgeting as a theoretical framework to analyse resource allocation in terms of the Maputo Protocol. The research question guiding this chapter concerns how an analysis of the interpretation of resource allocation for the effective realisation of human rights under CEDAW and the ICESCR can assist in guiding supervisory bodies to interpret and evaluate article 26(2) of the Maputo Protocol. This analysis departs from the hypothesis that the obligation to allocate resources for the realisation of human rights has been interpreted and analysed under CEDAW and the ICESCR, and can thus guide the interpretation of article 26(2) of the Maputo Protocol.

In this regard, concluding observations on state reports, statements, general comments, general recommendations as well as views under the respective communication procedures from the CEDAW Committee and the CESCRC inform the analysis in this chapter.⁴¹⁷

4 2 Resource allocation under CEDAW

4 2 1 Reporting guidelines

In terms of article 18 of CEDAW, state parties must report on all legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of CEDAW. These reports must indicate any factors or difficulties which the state parties face in fulfilling its obligations under CEDAW.⁴¹⁸ In terms of the Compilation of Guidelines on the Form and Content of Reports to be Submitted by State Parties to the International Human Rights Treaties (“Compilation Reporting Guidelines”),⁴¹⁹ state parties to CEDAW have to submit their reports in two parts: part one being a common core document and part two a document specifically related to the implementation of CEDAW.⁴²⁰ The common core document is the first part of any

⁴¹⁷ In terms of the CEDAW Committee, the clarifications released on certain provisions are called general recommendations, while the CESCRC refers to it as general comments. The terminology utilised by the two committees will be used throughout this chapter.

⁴¹⁸ Article 18(2).

⁴¹⁹ HRI/GEN/2/Rev.6 (3 June 2009).

⁴²⁰ *Reporting Guidelines* 65.

state report submitted to an international human rights body and should contain general information about the state party.

Part two of the state report should include a description of all practical and legal measures taken to implement CEDAW.⁴²¹ The Compilation Reporting Guidelines state that the description of the measures taken needs to be analytical and results-oriented. In this way, the CEDAW Committee can effectively identify any possible shortcomings in their concluding observations on state reports. The Compilation Reporting Guidelines also implicitly endorses the importance of anti-essentialist feminist legal theory.⁴²² This is observable in the requirement that state parties need to specifically address how CEDAW has been implemented with respect to different groups of women, in particular, those subject to multiple forms of discrimination.⁴²³ Because of this requirement, the CEDAW Committee can provide specific guidance to state parties regarding best practices on measures designed for diverse women.

Despite the extensive guidelines provided to state parties on how to report to the CEDAW Committee, no reference is made to elements of gender responsive budgeting or public finance. However, as Elson notes, the requirement for information on public finance could be indirectly inferred.⁴²⁴ In this regard, the Compilation Reporting Guidelines refers to the substantive similarities between the Beijing Declaration and Platform for Action (“Beijing Platform for Action”)⁴²⁵ and CEDAW.⁴²⁶ Because of this synergy, state parties are required to include any measures taken to implement the Beijing Platform for Action in their state report to the CEDAW Committee.⁴²⁷ The Beijing Platform for Action discusses the relation between public finance, women’s rights and state party’s obligations.⁴²⁸ It can, therefore, be indirectly inferred that state parties need to report on budgetary allocations for women’s rights in their state reports to the CEDAW Committee.

The Beijing Platform for Action identified twelve key areas where urgent action is required to ensure greater substantive equality and opportunities for women and girl

⁴²¹ 69.

⁴²² See further chapter three part 3.3 above.

⁴²³ 69.

⁴²⁴ Elson *Budgeting for Women’s Rights* 34.

⁴²⁵ UN Doc A/CONF.177/20 (1995).

⁴²⁶ *Reporting Guidelines* 70.

⁴²⁷ 70.

⁴²⁸ Beijing Platform for Action para 345-361.

children.⁴²⁹ It also encompasses, in part, anti-essentialist feminist legal theory within its twelve key areas as it refers to women's position in relation to poverty and race. The Beijing Platform for Action fundamentally calls for women's empowerment and gender equality⁴³⁰ and does this by providing a policy and programmatic agenda.⁴³¹ The Beijing Platform for Action is described as being a "springboard for institutionalising gender equality policy and gender analysis in public policy, including in public finance".⁴³² The Compilation Reporting Guidelines state that the policy and programmatic agenda provided for in the Beijing Platform for Action have direct application to CEDAW.⁴³³ This is because the twelve key areas of concern are related to specific articles in CEDAW resulting in an implementation crossover.⁴³⁴ The Beijing Platform for Action also provides guidance as to how countries involved in development cooperation should conduct their extraterritorial obligations.⁴³⁵

It goes on to state that full and effective implementation of the provisions contained therein would require the "integration of a gender perspective in budgetary decisions on policies and programmes, as well as the adequate financing of specific programmes for securing equality between women and men".⁴³⁶ State parties are also required to continuously review how women benefit from public expenditure and adjust budgetary allocations to ensure substantive equality through public expenditure.⁴³⁷ Gender responsive budgeting has been identified as a way for state parties to meet their obligations in terms of the Beijing Platform for Action.⁴³⁸ The UN Women Report on the Beijing Platform for Action ("UN Beijing Report") stated that for the gender responsive budgeting initiatives under the Beijing Platform for Action to be effective, they need to consider substantive equality when generating and spending

⁴²⁹ UN Women "Beijing Platform for Action: 12 Critical Areas of Concern" (2015) *UN Women* <<https://asiapacific.unwomen.org/en/news-and-events/stories/2015/03/b20-12-critical-areas-of-concern>> (accessed 07-07-2020). These twelve areas are women and poverty, education and training of women, women and health, violence against women, women and armed conflict, women and the economy, women in power and decision-making, institutional mechanisms, human rights of women, women and the media, women and the environment, and the girl child.

⁴³⁰ Beijing Platform for Action paras 1 and 3.

⁴³¹ Reporting Guidelines 70.

⁴³² A O'Hagan & E Klatzer "Introducing Gender Budgeting in Europe" in A O'Hagan & E Klatzer (eds) *Gender Budgeting in Europe: Developments and Challenges* (2018) 3 4.

⁴³³ Reporting Guidelines 70.

⁴³⁴ 70.

⁴³⁵ Beijing Platform for Action para 353. Extra-territorial obligations will be further discussed in part 4 2 3 3 below.

⁴³⁶ Beijing Platform for Action para 345.

⁴³⁷ Para 346.

⁴³⁸ UN Women *The Beijing Declaration and Platform for Action Turns 20* (2015) 53.

resources.⁴³⁹ Consequently, gender responsive budgeting initiatives need to be sensitive towards how taxation policies, fiscal policies and budgetary allocations affect different groups of women and different income groups, as prescribed by anti-essentialist feminist legal theory. The UN Beijing Report state that less developed countries should aim to allocate 0,15% of gross domestic product (“GDP”) to achieving substantive gender equality.⁴⁴⁰ If state parties to CEDAW are accordingly obligated to report on their initiatives to realise the Beijing Platform for Action, then all state reports given to the CEDAW Committee should contain gender responsive budgeting initiatives.

4 2 2 Examples of resource-intensive provisions

While CEDAW does not contain a specific article referring to the allocation of resources, like the ICESCR and the Maputo Protocol, Elson argues that resources play an essential role in the effective implementation of CEDAW.⁴⁴¹ This is because it is inconceivable that the achievement of substantive equality, as required by CEDAW, would have no implications for public finance.⁴⁴² The CEDAW Committee states that a joint reading of articles 1 to 5 and 24 form the general interpretative framework of all of the substantive articles in CEDAW.⁴⁴³ These articles impose three overarching obligations on state parties to eliminate discrimination against women.⁴⁴⁴ The first obligation is to ensure that there is no direct or indirect discrimination against women in legislation and that women are protected against discrimination by competent tribunals, sanctions and remedies.⁴⁴⁵ The second obligation aims to empower all women through effective policies and programmes.⁴⁴⁶ The third obligation is to address prevailing gender relations and gender stereotypes that affect women in law as well as legal and societal structures and institutions.⁴⁴⁷

⁴³⁹ 53.

⁴⁴⁰ 56.

⁴⁴¹ Elson *Budgeting for Women's Rights* 32.

⁴⁴² See chapter three part 3 3 1 above for a discussion on substantive equality.

⁴⁴³ CEDAW Committee, General Recommendation 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (2004) UN Doc HRI/GdEN/1/Rev.7 para 6 (“General Recommendation 25”).

⁴⁴⁴ Para 6.

⁴⁴⁵ Para 7.

⁴⁴⁶ Para 7.

⁴⁴⁷ Para 7.

The CEDAW Committee has confirmed that a delay in realising the core obligations in CEDAW cannot be justified on any grounds, including political, social, cultural, religious, economic, resource or any other constraints.⁴⁴⁸ Should a state party be facing resource constraints, such state is obliged to seek international assistance.⁴⁴⁹ Elson argues that wealthier countries have an obligation to assist poorer countries by providing the resources to sustain adequate fiscal policies for the realisation of the rights in CEDAW.⁴⁵⁰

The resource-intensive provisions which will be analysed are the prohibition of discrimination, gender-based violence, access to justice, health care, the prohibition of harmful stereotyping, and non-monetised care work. These provisions were selected because of the resource implications they have for state parties and the extensive analysis which the CEDAW Committee has conducted through general recommendations and concluding observations on state reports.⁴⁵¹ These provisions do not represent the only rights in CEDAW which have resource implications, however, because of the extensive analysis done by the CEDAW Committee, the discussion of these provisions provides the most insight into state parties' resource obligations under CEDAW.

The CEDAW Committee utilises general recommendations to clarify the obligations of state parties pertaining to resources needed to realise the relevant rights. These general recommendations are not directly binding on state parties, but are of persuasive power and should guide state parties in implementing their obligations under CEDAW.⁴⁵² The concluding observations of the CEDAW Committee on the periodic state reports submitted in terms of article 18(1) of CEDAW also provide clarification of how the CEDAW Committee interprets CEDAW and its recommendations to state parties on the implementation of their obligations. These

⁴⁴⁸ CEDAW Committee, General Recommendation 28 para 29.

⁴⁴⁹ Para 29.

⁴⁵⁰ Elson *Budgeting for Women's Rights* 33.

⁴⁵¹ Further justification on the inclusion of each individual provision will be done in the discussion of the particular provision's resource implications.

⁴⁵² A Byrnes "Using Gender-Specific Human Rights Instruments in Domestic Litigation: The Convention on the Elimination of All Forms of Discrimination against Women" in K Adams & A Byrnes (eds) *Gender Equality and the Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-child at the National Level* (1999) 51 60.

concluding observations on state reports are similarly not legally binding on state parties, but they also have persuasive power.⁴⁵³

The communications discussed below were all brought in terms of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (“OP-CEDAW”).⁴⁵⁴ The OP-CEDAW provides a complaint mechanism, through article 2, for individuals who argue that state parties are not acting in accordance with their international law obligations and effectively allocating resources to realise women’s rights. In terms of the OP-CEDAW, communications may be submitted by or on behalf of an individual or groups of individuals, claiming to be victims of a violation of any of the rights as set out in CEDAW by the state party.⁴⁵⁵ In cases where state parties raise resource constraints as a defence, then the CEDAW Committee will be inclined to examine the state parties’ resource allocations. Cases could also be brought where individuals or groups of individuals claim that state parties have ineffectively allocated resources to fulfil its obligations. In terms of article 7(3) of the OP-CEDAW, the CEDAW Committee submits its views as well as any recommendations to the state party and the individuals who submitted the communication.

4 2 2 1 *Prohibition of discrimination*

Article 2 of CEDAW, which prohibits discrimination against women in all its forms, implies resource obligations for state parties. In terms of article 2, “state parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.” Resource implications can be derived from state parties being required to pursue “all appropriate means” a policy to end discrimination against women. To this end, state parties have to adopt appropriate legislative and other measures which embody the principle of equality between men and women as well as repeal or modify any legislation which directly or indirectly discriminates against women.⁴⁵⁶ State parties should be able to justify the appropriateness of the measures it has adopted

⁴⁵³ MA Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (2012) 22.

⁴⁵⁴ (adopted by Resolution A/RES/54/4 of 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83.

⁴⁵⁵ Article 2 of OP-CEDAW.

⁴⁵⁶ Article 2(a), (b), (c), (e), (f) and (g).

and demonstrate how the intended effect will be achieved.⁴⁵⁷ The removal of laws that discriminate against women is arguably less resource intensive than other measures promoting substantive gender equality. However, the modification of existing legislation or the adoption of new legislation requires funding for its effective implementation.

Funding is required at various stages of implementation. For example, finances are needed to appoint a supervisory body to monitor the implementation of new legislation. The training of NGOs and civil society organisations on the application of the new legislation ensures a wider understanding of state obligations. Such training requires significant resource allocation.⁴⁵⁸ Financial support is furthermore also required for women who wish to pursue litigation to protect their rights in terms of the new legislation.⁴⁵⁹

General Recommendation 28 elaborates on the core obligations of state parties created under article 2. Article 2 requires state parties to ensure that women are not subjected to direct or indirect discrimination. The main obligation created in article 2 is twofold: First, state parties must assess the situation of women; and, secondly, formulate and implement policies which work towards the goal of eliminating all forms of discrimination against women to achieve substantive gender equality.⁴⁶⁰ The CEDAW Committee reiterates that the emphasis of the core obligations created in article 2 is the progressive movement forward towards substantive gender equality.⁴⁶¹

The CEDAW Committee acknowledges that the formulation and implementation of such policies are resource intensive at every stage of the process. State parties must ensure that resources are devoted to women to enable their participation in the development, implementation and monitoring of the policy.⁴⁶² Thus, women's groups and NGOs must be well-informed, consulted and able to play an active role in the development of such policies.⁴⁶³ In terms of General Recommendation 28, adequate resources need to be allocated to ensure that relevant benchmarks and monitoring mechanisms are created.⁴⁶⁴ To achieve this, the CEDAW Committee unequivocally

⁴⁵⁷ CEDAW Committee, General Recommendation 28 para 23.

⁴⁵⁸ Elson *Budgeting for Women's Rights* 32.

⁴⁵⁹ 32.

⁴⁶⁰ CEDAW Committee, General Recommendation 28 para 24.

⁴⁶¹ Para 24.

⁴⁶² Para 27.

⁴⁶³ Para 27.

⁴⁶⁴ Para 28.

stipulates that such policies must be linked to mainstream governmental budgetary processes.⁴⁶⁵ Budoo argues that these steps, as set out in General Recommendation 28, require state parties to adopt a gendered lens to resource allocation decisions.⁴⁶⁶

The CEDAW Committee has also, in general recommendations, addressed various groups of women that suffer disproportionately due to intersecting forms of discrimination and how they should best be protected.⁴⁶⁷ General Recommendation 28 states that an understanding of the concept of intersecting identities is needed when interpreting article 2 of CEDAW.⁴⁶⁸ Thus, state parties must always be aware of these multiple layers of discrimination when implementing measures to advance substantive gender equality. Thus, anti-essentialist feminist legal theory helps explain how article 2 of CEDAW could affect women with diverse identities.⁴⁶⁹

CEDAW also requires that there must be substantive equality in the allocation of budgetary resources.⁴⁷⁰ Substantive equality of resource allocation ensures that men are not favoured above women in respect of certain opportunities and access to services.⁴⁷¹ This is relevant to provisions such as article 10 (elimination of discrimination in education), article 11 (elimination of discrimination in employment), article 12 (elimination of discrimination in health), article 13 (elimination of discrimination in other areas of economic and social life) and article 14 (elimination of discrimination against women in rural areas). Substantive equality also makes provision for additional resources to be allocated to the meeting of women's specific needs without violating the principle of equality. Such affirmative allocations are evident in budgeting for sexual and reproductive rights within the health care budget, as well as any temporary special measures which may be put in place to advance women's involvement in the budgetary planning process.⁴⁷²

⁴⁶⁵ Para 28.

⁴⁶⁶ Budoo *The Role of Gender Budgeting* 58.

⁴⁶⁷ For example, General Recommendation 18 *Disabled Women* (1991) UN Doc A/46/38; General Recommendation 27 *on Older Women and Protection of Their Human Rights* (2010) UN Doc CEDAW/C/GC/27; General Recommendation 26 *on Women Migrant Workers* (2008) UN Doc CEDAW/C/2009/WP.1/R; and General Recommendation 34 *The Rights of Rural Women* (2016) UN Doc CEDAW/C/GC/34 ("General Recommendation 34").

⁴⁶⁸ CEDAW Committee, General Recommendation 28 para 18.

⁴⁶⁹ See chapter three part 3 3 above.

⁴⁷⁰ 33.

⁴⁷¹ See chapter three part 3 3 1 above for a discussion on substantive equality.

⁴⁷² Article 4(1) states that temporary special measures shall not be considered discrimination and 4(2) states that any special measure aimed at protecting maternity shall not be considered discriminatory. See part 4 2 3 1 below for a discussion on temporary special measures.

The CEDAW Committee has acknowledged, in various general recommendations, the impact of multiple layers of discrimination on women.⁴⁷³ Additional grounds such as “ethnicity, race, indigenous or minority status, colour, socio-economic status, caste, language, religion or belief, political opinion, national origin, marital status, maternity, parental status, age, urban or rural location, health status, disability, property ownership”, sexuality, illiteracy, pursuing asylum, refugee status, “internally displaced or stateless, widowhood, migration status, heading households, living with HIV/AIDS, being deprived of liberty”, partaking in sex work, circumstances of armed conflict, geographical remoteness, as well as the stigmatisation of women who are women’s rights activists have been identified as having the potential to compound the discrimination that women face.⁴⁷⁴

Thus, state parties must acknowledge that women can never be considered a homogenous group and government budgets and policies should reflect this fact.⁴⁷⁵ Byrnes states that the exploration of intersectionality is one of the most prominent developments that the CEDAW Committee has made.⁴⁷⁶ The CEDAW Committee has also acknowledged the significance of intersectional discrimination in the *Kell v Canada* (“Kell”) communication.⁴⁷⁷ The author of the communication, a Canadian aboriginal woman, argued that she was discriminated against when claiming possession of property which was lawfully hers but she had been denied access to by her abusive partner. She also argued that she was discriminated against when reporting domestic abuse, because of her sex and cultural heritage.⁴⁷⁸

The CEDAW Committee stated that an understanding of intersectional discrimination is paramount when state parties interpret their obligations under article

⁴⁷³ CEDAW Committee General Recommendation 25 *on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures* (2004) UN Doc HRI/GdEN/1/Rev.7; General Recommendation 27 *on Older Women and Protection of Their Human Rights* (2010) UN Doc CEDAW/C/GC/27; General Recommendation 28 *Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women* (2010) UN Doc CEDAW/C/GC/28; General Recommendation 33 *Women’s Access to Justice* (2015) UN Doc CEDAW/C/GC/33; General Recommendation 34 *The Rights of Rural Women* (2016) UN Doc CEDAW/C/GC/34; and General Recommendation 35 *Gender-based Violence Against Women, Updating General Recommendation No. 19* (2017) UN Doc CEDAW/C/GC/35.

⁴⁷⁴ CEDAW Committee, General Recommendation 35 para 12.

⁴⁷⁵ CEDAW Committee, General Recommendation 34 para 14.

⁴⁷⁶ A Byrnes “The Committee on the Elimination of Discrimination against Women” in A Hellum & H Aasen (eds) *Women’s Human Rights: CEDAW in International, Regional and National Law* (2013) 41.

⁴⁷⁷ Communication No 19/2008, CEDAW/C/51/D/19/2008 (27 April 2012).

⁴⁷⁸ Paras 1 and 3.1.

2 of CEDAW.⁴⁷⁹ The author in *Kell* was in a vulnerable position because of her status as an aboriginal woman, and the state party was obliged to ensure the elimination of such discrimination.⁴⁸⁰ Hodson suggests that the *Kell* communication represents a shift in the CEDAW Committee's confidence in condemning multiple layers of discrimination.⁴⁸¹ The CEDAW Committee considered the role that the author's background had played in her struggle to claim her property rights and report the domestic violence. The *Kell* communication demonstrates that an understanding of anti-essentialist feminist legal theory is beneficial in interpreting women's rights.⁴⁸² Thus, state parties would be better equipped to understand and accommodate women with diverse identities if resources are allocated to the sensitivity training of police personnel and members of the judiciary.

The CEDAW Committee has furthermore stated that temporary special measures, such as the creation of task teams and supervisory bodies, may be necessary to eliminate multiple layers of discrimination and mitigate the negative effect they have on women.⁴⁸³ Campbell argues that integrating intersectionality into the interpretation of CEDAW provides a more comprehensive approach and the "transformative equality framework demonstrates how the CEDAW Committee can fully integrate an intersectional perspective and address the unique needs of racial and ethnic minority women who live in poverty and all women with multiple identities".⁴⁸⁴ In the concluding observations on the state report of the Republic of Korea, the CEDAW Committee also expressed the importance of legislation which prohibits discrimination against women, including intersecting forms of discrimination affecting disadvantaged groups of women.⁴⁸⁵

The CEDAW Committee addressed discrimination against women in detention facilities in the *Abramova v Belarus* ("*Abramova*") communication.⁴⁸⁶ The author of the communication submitted that she faced gender-based discrimination as there were

⁴⁷⁹ Para 10.2.

⁴⁸⁰ Para 10.3.

⁴⁸¹ L Hodson "Women's Rights and the Periphery: CEDAW's Optional Protocol" (2014) 25 *EJIL* 561 578.

⁴⁸² See chapter three part 3 3 1 above for a discussion on anti-essentialist feminist legal theory.

⁴⁸³ CEDAW Committee, General Recommendation 27 para 12. Article 4 of CEDAW refers to temporary special measures. See part 4 2 3 1 below.

⁴⁸⁴ M Campbell "CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination" (2015) 11 *Revista Direito GV* 479 481.

⁴⁸⁵ CEDAW Committee *Concluding Observations on the Eight Periodic Report of the Republic of Korea* (2018) UN Doc CEDAW/C/KOR/CO/8 para 13.

⁴⁸⁶ Communication No 23/2009, CEDAW/C/49/D/23/2009 (27 September 2011).

only male staff in the detention facility in which she was held.⁴⁸⁷ All the female prisoners shared one toilet which was visible to the male staff and the staff periodically watched the prisoners through a peephole.⁴⁸⁸ The CEDAW Committee noted that women being held in a detention facility exclusively staffed by men and facing humiliating treatment constitutes degrading treatment and gender-based discrimination within the meaning of article 1 of CEDAW.⁴⁸⁹ The CEDAW Committee recommended that the state party ensure that women detainees have access to gender-specific health care and are only supervised by properly trained women staff.⁴⁹⁰ The CEDAW Committee stated that special measures, as per article 4 of CEDAW, are not deemed to be discriminatory if they are enacted to ensure the specific needs of women prisoners are addressed.⁴⁹¹ Cusack and Pusey argue that the decision in *Abramova* holds state parties to a high standard and provides practical recommendations for measures for the prohibition of discrimination.⁴⁹² Such measures, if implemented with the appropriate resources, safeguard future female detainees.⁴⁹³

4 2 2 2 *Gender-based violence*

CEDAW does not contain a specific article which addresses gender-based violence. However, through the adoption of General Recommendation 19, and subsequently General Recommendation 35, the CEDAW Committee has interpreted CEDAW to address the issues of gender-based violence.⁴⁹⁴ The CEDAW Committee referred particularly to article 2 (the non-discrimination clause), explaining that non-discrimination against women and substantive equality cannot be achieved without eliminating gender-based violence.⁴⁹⁵ Thus, the eradication of gender-based violence is central to achieving substantive equality between men and women. To respond to

⁴⁸⁷ Para 2.2.

⁴⁸⁸ Para 2.4.

⁴⁸⁹ Para 7.2 and 7.4.

⁴⁹⁰ Para 7.9(1)(b) and 7.9(1)(d).

⁴⁹¹ Para 7.5. See part 4 2 3 1 below for a discussion on temporary special measures.

⁴⁹² S Cusack & L Pusey “CEDAW and the Rights to Non-Discrimination and Equality” (2013) 14 *Melb J Int'l L* 54 75.

⁴⁹³ Hodson (2014) *EJIL* 571.

⁴⁹⁴ CEDAW Committee, General Recommendation 19 *On Violence Against Women* (1992) UN Doc CEDAW/C/GC/19; CEDAW Committee, General Recommendation 35 *Gender-based Violence Against Women, Updating General Recommendation No. 19* (2017) UN Doc CEDAW/C/GC/35.

⁴⁹⁵ CEDAW Committee, General Recommendation 35 para 34(f) para 11.

and eradicate gender-based violence, state parties are required to allocate appropriate human and financial resources at the national, regional, and local levels to effectively implement legislation and policies for the protection of women.⁴⁹⁶

The CEDAW Committee has interpreted articles 2(c), (d), (f), and 5(a) to provide that state parties have to adequately provide budgetary resources for the adoption and implementation of diverse institutional measures.⁴⁹⁷ These measures include the creation of focused public policies, the development and implementation of monitoring mechanisms, and the establishment and funding of competent tribunals.⁴⁹⁸ The CEDAW Committee reiterated in *VK v Bulgaria* (“VK”) that where a state party does not provide adequate shelters for women and children, it constitutes a violation under article 2(c) and (e) of CEDAW to provide for the immediate protection of women from violence.⁴⁹⁹ The CEDAW Committee thus recommended that the state party ensures sufficient state-funded shelters are available and adequate support is given to NGOs offering shelters.⁵⁰⁰ The CEDAW Committee has also expressed concern about state parties who have insufficient services of counselling and psychological treatment centres available to women who have experienced sexual violence.⁵⁰¹

In *X and Y v Georgia* (“X and Y”), the authors, a mother and daughter, described the domestic abuse which they endured from their husband and father, respectively.⁵⁰² The wife had married her husband after he had raped her, as she believed that no one would want to marry her after she had been raped.⁵⁰³ The continued violence which the wife and children endured had been reported to the police, however, the authorities decided not to open a case.⁵⁰⁴ The CEDAW Committee condemned Georgia for the lack of investigation into the matter as well as the failure to adopt appropriate measures to ensure the prohibition of gender-based violence.⁵⁰⁵ The CEDAW Committee recommended that resources be allocated to ensure the victims of

⁴⁹⁶ Para 34(f).

⁴⁹⁷ Para 26(b).

⁴⁹⁸ Para 26(b).

⁴⁹⁹ Communication No 20/2008, CEDAW/C/49/D/20/2008 (27 September 2011) para 9.13.

⁵⁰⁰ Para 9.16(b)(iii).

⁵⁰¹ CEDAW Committee *Concluding Observations on the Eighth Periodic Report of the Republic of Korea* (2018) UN Doc CEDAW/C/KOR/CO/8 para 23(g).

⁵⁰² Communication No 24/2009, UN Doc CEDAW/C/61/D/24/2009 (2015).

⁵⁰³ Para 2.1.

⁵⁰⁴ Para 2.9.

⁵⁰⁵ Para 9.7.

domestic violence and their children were provided with timely and adequate support, including shelters and psychological support.⁵⁰⁶

The *X and Y* communication emphasises the dangers that women face when domestic violence is reported to the police and little or no action is taken.⁵⁰⁷ The inaction by poorly trained police often results in further violence being inflicted on the women. The Special Rapporteur on Violence Against Women, its Causes and Consequences (“Special Rapporteur on Violence against Women”)⁵⁰⁸ reinforced that state parties need to actively work to eliminate the stigmatisation around domestic violence as many women who have experienced violence, are often forced by their community, in particular rural communities, or the police to remain with their perpetrators as they are considered tainted women.⁵⁰⁹ Women who return to their perpetrators are in danger of experiencing the same, or worse, violence. The Special Rapporteur on Violence Against Women called for the creation of more shelters for women who are victims of domestic violence as well as measures which empower women who have to leave the shelter.⁵¹⁰ Measures such as access to housing or employment would assist in women not being rendered more vulnerable to return to their perpetrators.⁵¹¹ Such measures require significant resource commitments from state parties.

The *Yildirim (deceased) v Austria* (“*Yildirim*”) and *Goekce (deceased) v Austria* (“*Goekce*”) communications expanded on the state party’s duty of due diligence for the actions of non-state actors.⁵¹² In both cases, the victims were killed by their husbands after prolonged domestic abuse, which had been reported to the police.⁵¹³

⁵⁰⁶ Para 11(b)(i).

⁵⁰⁷ EHRAC “First Ever International Decision on Domestic Violence in Georgia Highlights Serious Shortcomings in State Response” (2016) *European Human Rights Advocacy Centre* <<http://ehrac.org.uk/news/first-ever-international-decision-on-domestic-violence-in-georgia-highlights-serious-shortcomings-in-state-response/>> (accessed 07-07-2020).

⁵⁰⁸ As created by Resolution 1994/45 (4 March 1994).

⁵⁰⁹ OHCHR “Break the Cycle of Silence and Acceptance of Violence Against Women’ Expert Urges Georgia” (2016) *United Nations Human Rights Office of the High Commissioner* <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17087&LangID=E>> (accessed 07-07-2020).

⁵¹⁰ 1.

⁵¹¹ 1.

⁵¹² Communication No 6/2005, UN Doc CEDAW/C/39/D/6/2005 (1 October 2007); Communication No 5/2005, UN Doc CEDAW/C/39/D/5/2005 (6 August 2007). As the communications had similar facts, both were brought against Austria and were seen by the CEDAW Committee during a similar time, the CEDAW Committee provided similar recommendations to the state party.

⁵¹³ *Yildirim (deceased) v Austria* Communication No 6/2005, UN Doc CEDAW/C/39/D/6/2005 (1 October 2007) para 2.13; *Goekce (deceased) v Austria* Communication No 5/2005, UN Doc CEDAW/C/39/D/5/2005 (6 August 2007) para 2.11.

Even though the domestic abuse also included multiple threats of murder, the perpetrators were not detained by the police and the state party was not able to adequately protect the women from the violence.⁵¹⁴ The CEDAW Committee noted in both communications that the state party has “established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness-raising, education and training, shelters, counselling for victims of violence and work with perpetrators”.⁵¹⁵ Cusack and Pusey argue that these two communications demonstrate how often women do not benefit from the state party’s legal protections in practice.⁵¹⁶ Thus, Austria was recommended to strengthen the implementation of protection against gender-based violence legislation and ensure enhanced coordination among law enforcement, judicial officers and NGOs that work to protect and support women who are victims of gender-based violence.⁵¹⁷ This strengthening and coordination requires significant resource allocation from the state party.

In *VPP v Bulgaria* (“VPP”), the state party was held liable for the inadequate protection provided to a minor who was the victim of sexual violence.⁵¹⁸ Cusack and Pusey argue that the *VPP* communication reinforced the seriousness with which the CEDAW Committee views gender-based violence.⁵¹⁹ The state party had failed in its obligation to protect victims of gender-based violence. The CEDAW Committee was critical of the state party in the *VPP* communication because, first, the perpetrator had been charged with sexual molestation, rather than the more serious offence of rape or attempted rape.⁵²⁰ Secondly, the perpetrator had only received a three year suspended sentence, which is considerably lower than the prescribed statutory maximum sentence.⁵²¹ The CEDAW Committee also expressed concern that there

⁵¹⁴ *Yildirim (deceased) v Austria* Communication No 6/2005, UN Doc CEDAW/C/39/D/6/2005 (1 October 2007) para 2.10; *Goekce (deceased) v Austria* Communication No 5/2005, UN Doc CEDAW/C/39/D/5/2005 (6 August 2007) para 2.9.

⁵¹⁵ *Yildirim (deceased) v Austria* Communication No 6/2005, UN Doc CEDAW/C/39/D/6/2005 (1 October 2007) para 12.1.2; *Goekce (deceased) v Austria* Communication No 5/2005, UN Doc CEDAW/C/39/D/5/2005 (6 August 2007) para 12.1.2.

⁵¹⁶ Cusack & Pusey (2013) *Melb J Int'l L* 74.

⁵¹⁷ *Yildirim (deceased) v Austria* Communication No 6/2005, UN Doc CEDAW/C/39/D/6/2005 (1 October 2007) para 12.3(a) & (c); *Goekce (deceased) v Austria* Communication No 5/2005, UN Doc CEDAW/C/39/D/5/2005 (6 August 2007) para 12.3 (a) & (c).

⁵¹⁸ Communication No 31/2011, UN Doc CEDAW/C/53/D/31/2011 (27 November 2012) para 10(2)(d).

⁵¹⁹ Cusack & Pusey (2013) *Melb J Int'l L* 76.

⁵²⁰ *VPP v Bulgaria* Communication No 31/2011, UN Doc CEDAW/C/53/D/31/2011 (27 November 2012) para 9.5.

⁵²¹ Para 9.5.

were no mechanisms in place to protect the victim from re-victimisation, such as protection or restriction orders, as the perpetrator was released back into society after the criminal proceedings.⁵²² Thus, state parties are obligated to allocate resources towards shelters and the monitoring of restraining orders, which would ensure the protection of victims of gender-based violence from further abuse.

The existence of gender stereotypes, as displayed in the *Georgia* communication, makes it increasingly difficult for women to report gender-based violence and receive the justice required. This was evident in *RPB v The Philippines* (“*RPB*”) where the author noted that she had faced gender stereotyping during her rape trial.⁵²³ The court made reference to how a rape victim should act when confronted with a violent act, such as struggling and trying to attack her assailant, and that the author had not displayed these traits.⁵²⁴ The CEDAW Committee noted, with concern, that such stereotypes lead to the victims of rape being placed at a legal disadvantage and recommended that such stereotypes be removed from all future gender-based violence proceedings.⁵²⁵

The *RPB* communication referred to *Vertido v the Philippines* (“*Vertido*”) where the state party had made use of similar stereotypes of how a rape victim should have acted when being attacked.⁵²⁶ Some of the stereotypes that the state party employed during the trial of the author of *Vertido* was that rape victims should try and escape at every stage of the assault and that older men lack the necessary sexual prowess to commit the act of rape.⁵²⁷ The court also referred to myths about rape such as the fact that the victim and perpetrator know each other well makes the interaction consensual.⁵²⁸ The CEDAW Committee stated that the use of such harmful gender stereotypes during gender-based violence cases results in the victims being re-victimised during their trial.⁵²⁹ Cusack and Timmer argue that state parties have an obligation to address the systematic judicial stereotyping that occurs during gender-based violence cases.⁵³⁰ The eradication of violence against women can only take

⁵²² Para 9.7.

⁵²³ Communication No 34/2011, UN Doc CEDAW/C/57/D/34/2011 (21 February 2014).

⁵²⁴ Para 3.3.

⁵²⁵ Para 3.7, 9(b)(i) and 9(b)(iii). The *RPB* communication is further discussed in part 4 2 2 6 below.

⁵²⁶ Communication No 18/2008, UN Doc CEDAW/C/46/D/18/2008 (22 September 2010).

⁵²⁷ Para 3.5.1 and 3.5.7.

⁵²⁸ Para 3.5.4.

⁵²⁹ Para 8.8.

⁵³⁰ S Cusack & ASH Timmer “Gender Stereotyping in Rape Cases: The CEDAW Committee’s Decision in *Vertido v The Philippines*” (2011) 11 *Human Rights Law Review* 329 338.

place when gender stereotypes are eliminated from the investigations into the violence.⁵³¹ The modification of such stereotypes and social prejudices requires a significant commitment from state parties, including the allocation of resources towards training and education programmes.⁵³²

Similar gender stereotypes were also illustrated in the *Jallow v Bulgaria* (“Jallow”) communication where the state party was accused of failing to conduct a timely and suitable investigation into the author’s allegations of domestic violence.⁵³³ The state party in the *Jallow* communication investigated allegations of abuse that the author’s male partner had made but not the allegations made by the author. The CEDAW Committee argued that such actions were based on gender stereotypes that the husband was superior and more trustworthy than the wife.⁵³⁴ The CEDAW Committee recommended that all judges, prosecutors, and law enforcement personnel receive training on CEDAW, its implications and how to handle cases in a gender-sensitive manner.⁵³⁵ Training such as this requires significant resource investments from state parties. The training also needs to focus on the effect of multiple levels of discrimination, to ensure that complaints regarding gender-based violence are adequately received and considered.⁵³⁶ Thus, an understanding of the multiple identities of women, which can give rise to discrimination and gender-based violence, assists in the review and assessment of such training programmes.⁵³⁷

The CEDAW Committee has further acknowledged the varying degrees that women may face gender-based violence because of intersecting forms of discrimination.⁵³⁸ Thus, appropriate legal and policy responses are required to ensure all groups of women are protected.⁵³⁹ The policies and programmes adopted to address intersecting degrees of discrimination must also aim to eliminate intersecting discrimination.⁵⁴⁰ In the Report of Inquiry Concerning Canada, the CEDAW Committee stated that intersectional discrimination can stem from complex factors.⁵⁴¹ This

⁵³¹ 341.

⁵³² Gender stereotyping is further discussed under part 4 2 2 3 below.

⁵³³ Communication No 32/2011, UN Doc CEDAW/C/52/D/32/2011 (28 August 2012) para 8.4.

⁵³⁴ Para 8.6.

⁵³⁵ Para 8.8(2)(c).

⁵³⁶ Para 8.8(2)(c).

⁵³⁷ See chapter three part 3 3 2 above for a discussion on anti-essentialist feminist legal theory.

⁵³⁸ CEDAW Committee, General Recommendation 35 para 12.

⁵³⁹ Para 12.

⁵⁴⁰ CEDAW Committee, General Recommendation 28 para 18.

⁵⁴¹ CEDAW Committee *Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination Against Women under Article 8 of the Optional Protocol to the Convention on the*

particular report considered the compounding discrimination that aboriginal women face in Canada due to their sex, gender, geographical isolation, rural environments and aboriginal identity.⁵⁴² State parties must, therefore, take appropriate steps to eliminate all forms of discrimination against women, including intersecting forms of discrimination.⁵⁴³ Thus, state parties need to consider the role that the multiple identities of women can give rise to compounding violence when allocating resources to prevent gender-based violence.⁵⁴⁴

The CEDAW Committee also noted in the concluding observations on the state report of Costa Rica that there is a concerning amount of gender-based violence recorded against lesbian, bisexual and transgender women, and intersex persons.⁵⁴⁵ In response to this, the CEDAW Committee stated that the state party needs to “adopt measures to prevent, investigate, prosecute and adequately punish hate crimes against them and provide reparation, including compensation, to victims”.⁵⁴⁶ Measures such as this require substantial resources from the state party to ensure women from all backgrounds are protected. An understanding of anti-essentialist feminist legal theory can guide the evaluation of such measures as there needs to be sufficient protection provided to women from vulnerable groups.

In the concluding observations on the state report of the Bahamas, the CEDAW Committee expressed concern on the level of capacity training which the police receive to address complaints about gender-based violence from women who belong to disadvantaged groups.⁵⁴⁷ The CEDAW Committee recommended that the state party allocate resources which ensure that the police and courts receive the necessary training to address gender-based violence complaints in an efficient and gender-sensitive manner.⁵⁴⁸

Elimination of All Forms of Discrimination Against Women (2015) Un Doc CEDAW/C/OP.8/CAN/1 para 204.

⁵⁴² Para 204.

⁵⁴³ Para 205.

⁵⁴⁴ See chapter three part 3.3.2 above for a discussion on anti-essentialist feminist legal theory.

⁵⁴⁵ CEDAW Committee *Concluding Observations on the Seventh Periodic Report of Costa Rica* (2017) UN Doc CEDAW/C/CRI/CO/7 para 16(f).

⁵⁴⁶ Para 17(f).

⁵⁴⁷ CEDAW Committee *Concluding Observations on the Sixth Periodic Report of the Bahamas* (2018) UN Doc CEDAW/C/BHS/CO/6 para 13.

⁵⁴⁸ Para 14(b).

4 2 2 3 *Prohibition of harmful stereotyping*

Article 5(a) of CEDAW provides that state parties shall take all appropriate measure to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the ideas of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. Article 5(a) should also be considered alongside article 2(f).⁵⁴⁹ Eradicating harmful stereotyping is resource intensive for state parties and, thus, the CEDAW Committee provides clear recommendations about the educational measures which would be most effective to realise article 5(a) and 2(f) of CEDAW.

State parties thus should adopt educational and public information programmes, which are aimed at the elimination of prejudices and harmful stereotypes.⁵⁵⁰ The CEDAW Committee has elaborated, in General Recommendation 35, that state parties are obligated to adopt and implement measures which eradicate harmful gender prejudices, stereotypes and practices.⁵⁵¹ The CEDAW Committee has also acknowledged that the way women are viewed in certain cultures and traditions perpetuates harmful practices, such as female circumcision.⁵⁵² Such harmful practices are deeply rooted in social attitudes which view women and girls as inferior.⁵⁵³ The CEDAW Committee remains firm in its stance that state parties need to intervene when women’s rights are being violated based on culture, religious practices or beliefs.⁵⁵⁴ To address these harmful practices, the CEDAW Committee has stated that far-reaching educational initiatives are necessary, which include temporary special measures to modify the social and cultural patterns which are based on the idea of the

⁵⁴⁹ Article 2(f) of CEDAW reads that, “state parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (...) [t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.

⁵⁵⁰ CEDAW Committee, General Recommendation 3 *Education and Public Information Campaigns* UN Doc A/42/38 (1987).

⁵⁵¹ CEDAW Committee, General Recommendation 35 para 26.

⁵⁵² CEDAW Committee, General Recommendation 14 *Female Circumcision* UN Doc A/45/38 (1990).

⁵⁵³ CEDAW Committee, General Recommendation 31 *Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women / General Comment No.18 of the Committee on the Rights of the Child on Harmful Practices* UN Doc CEDAW/C/GC/31-CRC/C/GC/18 (2014) para 6.

⁵⁵⁴ Freeman, Chinkin & Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women* 156.

inferiority of men and women.⁵⁵⁵ These educational initiatives, such as workshops, the establishment of task teams and the amendment of legislation, require a significant resource commitment from state parties. The African Court also applied article 5(a) of CEDAW in the *APDF* case.⁵⁵⁶ The African Court reiterated the importance of measures which would sensitise, enlighten and educate citizens on the dangers of harmful stereotyping.⁵⁵⁷

The CEDAW Committee has also identified these harmful practices and stereotypes as some of the root causes of gender-based violence.⁵⁵⁸ In the *Yildirim* and *Goekce* communications, the CEDAW Committee did not directly apply article 5(a), however, it stated that there is a direct link between traditional attitudes, where women are considered subordinate to men, and domestic violence.⁵⁵⁹ In the *Vertido* communication, the CEDAW Committee referred directly to article 5(a) of CEDAW, stating that the gender stereotypes and rape myths that were utilised during the author's trial were harmful to the victim and the battle against gender-based violence.⁵⁶⁰ The *RPB* communication also discussed harmful stereotyping that took place during the victim's rape trial, however, it was concerning that the CEDAW Committee made no direct reference to article 5(a) of CEDAW.⁵⁶¹ In the concluding observations on the state report of the Philippines, the CEDAW Committee reiterated how discriminatory gender stereotyping and stigmatisation pose barriers to justice and effective remedies, particularly for women facing multiple levels of discrimination.⁵⁶²

As part of the recommendations to the state party in *Vertido*, the CEDAW Committee moreover stated that training and education targeted at changing discriminatory attitudes towards women within the legal system are needed.⁵⁶³ Such

⁵⁵⁵ CEDAW Committee, General Recommendation 31 Para 31.

⁵⁵⁶ See chapter two part 2 2 2 above for a discussion of the *APDF* case.

⁵⁵⁷ *APDF and IHRDA v Republic of Mali* Application No 046/2016 paras 125 and 126.

⁵⁵⁸ CEDAW Committee, General Recommendation 35 para 26. A more detailed discussion of gender-based violence can be found in part 4 2 2 2 above.

⁵⁵⁹ *Yildirim (deceased) v Austria* Communication No 6/2005, UN Doc CEDAW/C/39/D/6/2005 (1 October 2007) para 12.2; *Goekce* para 12.2. See part 4 2 2 2 above for a further discussion on the *Yildirim* and *Goekce* communications.

⁵⁶⁰ *Vertido v the Philippines* Communication No 18/2008, UN Doc CEDAW/C/46/D/18/2008 (22 September 2010) para 3.4. See part 4 2 2 2 above for a further discussion on the *Vertido* communication.

⁵⁶¹ See part 4 2 2 2 above for a further discussion on the *RPB* communication.

⁵⁶² CEDAW Committee *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of the Philippines* (2016) UN Doc CEDAW/C/PHL/CO/7-8 para 14(b).

⁵⁶³ *Vertido v the Philippines* Communication No 18/2008, UN Doc CEDAW/C/46/D/18/2008 (22 September 2010) para 8.9(b).

education should include training for judges, lawyers, law enforcement personnel, and medical personnel on CEDAW and understanding gender-based violence and sexual crimes in a gender-sensitive manner.⁵⁶⁴ This training will require significant budgetary allocations in order to acquire effective trainers, workshops, course material, task teams and monitoring bodies. Cusack and Timmer argue that the CEDAW Committee could have achieved more in *Vertido* by examining the systematic gender stereotyping in the judicial system, and thus further clarifying state parties' obligations under article 5(a) of CEDAW.⁵⁶⁵ There was also a missed opportunity in *Vertido* to clarify the differences between the state party obligations in article 2(f) and 5(a).⁵⁶⁶

However, the CEDAW Committee later provided more clarification on article 5(a) of CEDAW through General Recommendation 35. It recommended that state parties develop and implement measures that eradicate gender stereotypes, prejudices, customs and practices which underpin the structural inequality between men and women.⁵⁶⁷ These measures should be developed with the active participation of relevant women's NGOs as well as organisations which represent marginalised groups of women.⁵⁶⁸ The implementation of these measures also includes the integration of gender equality into curricula at all levels of education, which a focus on stereotyped gender roles and non-discrimination, and awareness campaigns around the understanding of gender-based violence and the legal recourse available to victims.⁵⁶⁹ Thus, the implementation of these measures by state parties requires significant resources in the form of task teams, textbooks, and salaries of teachers and trainers.

In the *RKB v Turkey* ("RKB") communication, the CEDAW Committee reiterated that it would require more than the enactment of legislation to protect women against harmful stereotyping; these laws need to be implemented.⁵⁷⁰ The author, in the *RKB* communication, was accused of having an affair with a male colleague and, as a result, was dismissed by her employer.⁵⁷¹ However, her male colleague was not

⁵⁶⁴ Para 8.9(b)(iv).

⁵⁶⁵ Cusack & Timmer *Human Rights Law Review* 338.

⁵⁶⁶ 340.

⁵⁶⁷ CEDAW Committee, General Recommendation 35 para 30(b).

⁵⁶⁸ Para 30(b). The active involvement of NGOs and civil society who represent women's interests is a key part of gender responsive budgeting. See chapter three part 3.4.4 above.

⁵⁶⁹ Para 30(b)(i) & (ii).

⁵⁷⁰ Communication No 28/2010, UN Doc CEDAW/C/51/D/28/2010 (13 April 2020).

⁵⁷¹ Para 2.1.

dismissed. The author referred the case to the Labour Court in Turkey, where her moral integrity was scrutinised. The Labour Court did not grant any legal recourse against her employer.⁵⁷² The CEDAW Committee expressed concern about the gender bias that extramarital affairs were condoned for men, but that women were subject to penalties for such affairs.⁵⁷³ Thus, the CEDAW Committee recommended that measures be taken to ensure that the prohibition against gender stereotyping is practically implemented. Such implementation requires regular and appropriate training on CEDAW for judges, lawyers and law enforcement personnel.⁵⁷⁴ Thus, to ensure state parties meet their obligations in terms of article 5(a) and article 2(f) of CEDAW, the CEDAW Committee has made progressive recommendations in terms of the budgetary commitment that state parties need to make. This includes that appropriate legislation which prohibits direct and indirect discrimination must be enacted alongside training and education on gender stereotyping in society.

4 2 2 4 *Health care*

Article 12 of CEDAW refers to all appropriate measures being taken to eliminate discrimination against women in health care.⁵⁷⁵ The CEDAW Committee has supplemented this provision by stating that state parties need to take appropriate budgetary and economic measures to the maximum extent of their available resources to ensure that women realise their right to health care.⁵⁷⁶ The percentage of the overall budget allocated to women's health should be comparable to that of men's health, while still taking into account the different health needs of men and women.⁵⁷⁷ Thus, state parties should ensure the removal of all barriers to women's access to health care, particularly sexual and reproductive health services, and should allocate resources for programmes aimed at the prevention and treatment of sexually

⁵⁷² Para 8.7.

⁵⁷³ Para 8.7.

⁵⁷⁴ Para 8.10(b)(i) and (ii).

⁵⁷⁵ Article 12 of CEDAW provides that:

"[1] State parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. [2] Notwithstanding the provisions of paragraph 1 of this article, state parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation".

⁵⁷⁶ CEDAW Committee, General Recommendation 24 *Women and Health* UN Doc A/54/38/Rev.1, chap1 (1999) para 17 ("General Recommendation 24").

⁵⁷⁷ Para 30.

transmitted diseases.⁵⁷⁸ Budoo argues that the CEDAW Committee recognises that women face more vulnerabilities in terms of health and, thus, the resource allocation for health care needs to reflect that.⁵⁷⁹ State parties are also not permitted to relinquish their obligations in terms of health care by transferring these powers to private entities.⁵⁸⁰ State parties are, thus, required to report to the CEDAW Committee on the measures that have been taken to organise public structures to promote and protect women's health.

In the *VPP* communication, the CEDAW Committee reiterated the importance of specialised health care services for victims of gender-based violence and sexual assault.⁵⁸¹ The author in the *VPP* communication argued that the state party had failed to provide appropriate health care services, including psychologists and trained health workers, to her minor daughter who was the victim of sexual violence.⁵⁸² The CEDAW Committee stated that it is the responsibility of the state party to ensure the provision of appropriate health services to victims of gender-based violence as well as the provision of gender-sensitive training to all health care workers.⁵⁸³ Such services and training require significant resources, however, it assists in the adequate protection of victims of gender-based violence.

In *Alyne da Silva Pimentel v Brazil* ("*Pimentel*"), the CEDAW Committee made recommendations on resource allocation for women's health rights.⁵⁸⁴ The petitioner claimed that her deceased daughter was the victim of a violation by the state party, Brazil, of her right to life and health under articles 2 and 12 of CEDAW.⁵⁸⁵ The daughter passed away from complications that arose from having to deliver a stillborn baby.⁵⁸⁶ The claim was that Brazil had failed to ensure access to quality medical treatment during the delivery, which resulted in the death of the mother-to-be.⁵⁸⁷ The CEDAW Committee considered whether the state party had allocated maximum available resources to women's health care as whether the state party had ensured that the

⁵⁷⁸ Para 31(b).

⁵⁷⁹ A Budoo *The Role of Gender Budgeting* 57.

⁵⁸⁰ CEDAW Committee, General Recommendation 24 para 17.

⁵⁸¹ *VPP v Bulgaria* Communication No 31/2011, UN Doc CEDAW/C/53/D/31/2011 (27 November 2012) para 9.10. See part 4 2 2 2 above for a further discussion on the *VPP* communication.

⁵⁸² Para 3.6.

⁵⁸³ Para 9.10.

⁵⁸⁴ Communication No 17/2008, UN Doc CEDAW/C/49/D/17/2008 (27 September 2011).

⁵⁸⁵ Para 1.

⁵⁸⁶ Para 3.4.

⁵⁸⁷ Para 3.4.

health policies and practices of private health care institutions were appropriate.⁵⁸⁸ The lack of appropriate maternal health services has a severe impact on women's specific health needs and their right to life.⁵⁸⁹

In the CEDAW Committee's views, General Recommendation 24, which addresses article 12 of CEDAW, was cited.⁵⁹⁰ The CEDAW Committee reiterated that state parties have to safeguard "women's right to safe motherhood and emergency obstetric services" and allocate the maximum available resources to these services.⁵⁹¹ To achieve this, health care systems must be able to provide services which prevent, detect and treat illnesses specific to women.⁵⁹² Consequently, states parties must make provision for "adequate professional training for health workers, especially on women's reproductive health rights".⁵⁹³ Budoo argues that such recommendations are resource intensive and adequate provision should be made in national budgets for their implementation.⁵⁹⁴

The CEDAW Committee has also reiterated the importance of sufficient resource allocation to ensure the establishment of duly equipped hospitals, especially in rural and remote areas.⁵⁹⁵ Budgetary allocations for sufficient medical care should be viewed through an anti-essentialist feminist legal theory lens as it acknowledges that women in poorer or remote areas are more vulnerable without adequate medical care. Campbell further argues that the *Pimentel* communication must be understood by considering the deceased's socio-economic status. This is due to the maternal mortality rate being much higher among women living in poverty.⁵⁹⁶ It was not solely her gender, but also her race, poverty and the fact that she lived in rural Brazil which resulted in the deceased's access to health care being undermined.⁵⁹⁷ Thus, in terms of the provision of medical services and the realisation of article 12 of CEDAW, state parties must provide resources to ensure all women's specific health care needs are met.

⁵⁸⁸ Paras 7.3 and 7.5.

⁵⁸⁹ Para 7.6.

⁵⁹⁰ Para 7.3.

⁵⁹¹ Para 7.3 referring to para 27 of General Recommendation 24.

⁵⁹² Para 7.3 referring to para 11 of General Recommendation 24.

⁵⁹³ Para 8(2)(b).

⁵⁹⁴ Budoo *The Role of Gender Budgeting* 56.

⁵⁹⁵ CEDAW Committee *Concluding Observations on the Eighth Periodic Report of Democratic Republic of Congo* (2019) UN Doc CEDAW/C/COD/CO/8 para 37(a).

⁵⁹⁶ Campbell *Revista Direito GV* 488.

⁵⁹⁷ 488.

4 2 2 5 *Non-monetised care work*

Non-monetised care work entails long and unrecognised hours of tasks such as care of other family members, cooking, cleaning, and childcare.⁵⁹⁸ Non-monetised care work is an important issue which should be accounted for in resource allocation strategies. This is because, in many societies, women and girls are responsible for the care work due to a stereotype, prescribing this role to them.⁵⁹⁹ Thus, women are often unable to negotiate a fairer balance between non-monetised care work and other opportunities.⁶⁰⁰ Chopra argues that by not adequately addressing non-monetised care work in fiscal policies, state parties are denying women's economic empowerment, and ultimately, the economic growth of the country.⁶⁰¹

Thus, resource allocation for women's rights needs to be cognisant of non-monetised care work to promote women's empowerment and contribution to society and the economy.⁶⁰² Esquivel reiterates this, by arguing that long-term development policies should be informed by non-monetised care work and its contribution to the GDP.⁶⁰³ The theme of non-monetised care work forms part of the Beijing Platform for Action⁶⁰⁴ as an area of critical concern.⁶⁰⁵ The Beijing Platform for Action notes how the reduction of public services has a disproportionate effect on women needing to take on more non-monetised care work.⁶⁰⁶ Thus, women involved in the non-monetised care economy need access to appropriate technologies, transportation, clean water and sanitation which would alleviate the further burden. Non-monetised care work advocacy also incorporates anti-essentialist feminist legal theory, as non-monetised care work largely affects women in poorer communities as well as rural areas. Rubin suggests that women who participate in non-monetised care work do

⁵⁹⁸ A Marphatia & R Moussié "A Question of Gender Justice: Exploring the Linkages Between Women's Unpaid Care Work, Education, and Gender Equality" (2013) 33 *International Journal of Educational Development* 85 85.

⁵⁹⁹ 85.

⁶⁰⁰ 85.

⁶⁰¹ D Chopra "Balancing Paid Work and Unpaid Care Work to Achieve Women's Economic Empowerment" (2015) 83 *Institute of Development Studies Policy Briefing* 1.

⁶⁰² 4.

⁶⁰³ V Esquivel "Sixteen Years after Beijing: What are the New Policy Agendas for Time-Use Data Collection" (2011) 17 *Feminist Economics* 215 219.

⁶⁰⁴ UN Doc A/CONF.177/20 (1995). See part 4 2 1 above for a more detailed discussion of the Beijing Platform for Action.

⁶⁰⁵ Critical Area F refers to women and the economy.

⁶⁰⁶ Para 160.

not, generally, contribute to retirements funds.⁶⁰⁷ Consequently, these women are discriminated against if they receive social security payments upon retirement. Thus, non-monetised care work affects state parties' overall expenditure strategies, particularly for social security budgetary considerations.⁶⁰⁸

Article 14 of CEDAW states that the "particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families" should be considered by state parties when realising women's rights. Article 14(1) specifically mentions the non-monetised care work sector of the economy. Thus, article 14 calls on state parties to consider the particular obstacles that rural women face and their significant contributions to the social and economic wellbeing of their families and communities.⁶⁰⁹ The CEDAW Committee recognises that rural women, who do the majority of non-monetised care work, are often insufficiently addressed or ignored in national legislation, policies and budgets.⁶¹⁰ However, non-monetised care work is also carried out by women in locations other than rural areas. Therefore, policies that are developed by state parties protecting women performing non-monetised care work need to be sensitive to women positioned differently in different locations and contexts.

In 1991, the CEDAW Committee released General Recommendation 17 which addressed non-monetised care work done by women.⁶¹¹ It recommended that state parties support studies which measure the non-monetised care work done by women.⁶¹² The quantification of such work is supported by article 11 of CEDAW.⁶¹³ Termine and Percic argue that article 11 of CEDAW is relevant for the protection of rural women who are involved in low productivity employment and non-monetised care work, as it calls for the elimination of discrimination in all forms of work.⁶¹⁴ This information allows state parties to adequately protect the rights of women who are

⁶⁰⁷ M Rubin & JR Bartle "Integrating Gender into Government Budgets: A New Perspective" (2005) 65 *Public Administration Review* 259 260.

⁶⁰⁸ 260.

⁶⁰⁹ P Termine & M Percic "Rural Women's Empowerment through Employment from the Beijing Platform for Action Onwards" (2015) 46 *IDS Bulletin* 33 34.

⁶¹⁰ CEDAW Committee, General Recommendation 34 para 4.

⁶¹¹ CEDAW Committee, General Recommendation 17 *Measurement and Quantification of the Unremunerated Domestic Activities of Women and their Recognition in the Gross Domestic Product* UN D Doc HRI/GEN/1/Rev.6 at 242 (2003).

⁶¹² Para a.

⁶¹³ Article 11 relates to the elimination of discrimination against women in all fields of employment or work of choice.

⁶¹⁴ Termine & Percic *IDS Bulletin* 34.

involved in non-monetised care work. The information on non-monetised care work also assists in guiding government expenditure to rural development. Elson argues that cuts in government expenditure should not be designed in ways that increase the burden of non-monetised care work performed by women.⁶¹⁵

The CEDAW Committee also recommends that states parties quantify and include the value of non-monetised care work performed by women in their GDP.⁶¹⁶ By doing so, the economic value of the care work performed by women is recognised and validated in national accounts. State parties would also be promoting inclusive and sustainable economic development for women participating in non-monetised care work through the acknowledgement of their contributions to local and national economies.⁶¹⁷ State parties are required to report on the measures taken to value non-monetised care work as well as any progress made to include non-monetised care work in national accounts and government budgets.⁶¹⁸ This reporting is done to the CEDAW Committee in terms of article 18 of CEDAW.⁶¹⁹

In General Comment 34, the CEDAW Committee stated that rural women carry out most of the non-monetised care work because of gender stereotypes and inequality within the household.⁶²⁰ When women, who perform non-monetised care work do not receive support and assistance by government, the cycle of poverty is perpetuated.⁶²¹ Chopra argues that young girls in poorer communities often have to drop out of school to fulfil non-monetised care work obligations at home, which results in them not having enough skills to eventually enter the workforce.⁶²² Thus, non-monetised care work, a lack of education and poverty create a cycle which, without adequate government protection and resources, leave women disempowered. The cycle of poverty which results from non-monetised care work further demonstrates how anti-essentialist feminist legal theory assists in understanding the different layers of non-monetised care work.

The lack of protection provided to women carrying out non-monetised care work is often as a result of gender-neutral policies which fail to challenge pre-existing gender

⁶¹⁵ Elson *Budgeting for Women's Rights* 33.

⁶¹⁶ CEDAW Committee General Recommendation 17 para b.

⁶¹⁷ CEDAW Committee General Recommendation 34 para 17(a).

⁶¹⁸ CEDAW Committee General Recommendation 17 Para c.

⁶¹⁹ Further information on state reporting can be found in part 4 2 1 above.

⁶²⁰ CEDAW Committee, General Recommendation 34 para 5.

⁶²¹ Para 5.

⁶²² Chopra *Institute of Development Studies Policy Briefing* 3.

stereotypes.⁶²³ Thus, the CEDAW Committee requires state parties to provide for non-monetised care work in their rural development through policies which are gender-responsive and backed-up by adequate budgets.⁶²⁴ State parties who allocate resources to initiatives such as providing childcare facilities and other community-based care services in rural areas, alleviate the burden of non-monetised care work on women.⁶²⁵ Technology investments in agriculture, irrigation, labour-saving and water-saving initiatives, also reduces the burden of non-monetised care work on women.⁶²⁶ Moreover, the CEDAW Committee has required that rural women, their representatives and NGOs be directly involved in the “assessment, analysis, planning, design, budgeting, financing, implementation, monitoring and evaluation” of all rural development strategies.⁶²⁷ Initiatives such as access to clean water and childcare facilities are crucial to women living in informal settlements.

Elson suggests that the only way to close the gender gap is to recognise, reduce and redistribute non-monetised care work.⁶²⁸ Recognising non-monetised care work means ensuring that the value it adds to economies is adequately understood.⁶²⁹ This includes putting a monetary value on this work by calculating how much it costs to hire care work as well as calculating how much time is put into non-monetised care work. Chopra argues that without due recognition, women face discrimination in the labour market and the domestic responsibilities impact on the health and wellbeing of women, further affecting their ability to participate in economic and social spheres.⁶³⁰ Reducing non-monetised care work relates to eradicating the systemic institutions which result in women not being able to leave the ambits of non-monetised care work.⁶³¹ This is resource intensive for state parties as they need to invest in clean water and sanitation, clean energy, public transport; as well as social infrastructures such as care services, health services and social security.⁶³² By doing so, the burden on women to walk great distances to fetch clean water as well as caring for children, the sick and the elderly is

⁶²³ CEDAW Committee, General Recommendation 34 para 10.

⁶²⁴ Para 36(a).

⁶²⁵ Para 52(h).

⁶²⁶ Para 74.

⁶²⁷ Para 54(d).

⁶²⁸ D Elson “Recognise, Reduce, and Redistribute Unpaid Care Work: How to Close the Gender Gap” (2017) 26 *New Labor Forum* 52.

⁶²⁹ 54.

⁶³⁰ Chopra *Institute of Development Studies Policy Briefing* 1.

⁶³¹ Elson (2017) *New Labor Forum* 56.

⁶³² 56.

alleviated. Thus, women's time is better distributed among other activities such as generating income and personal growth.

The redistribution of non-monetised care work is more difficult for state parties to implement. Few strategies are currently proven to reduce the non-monetised care work burden on women.⁶³³ Elson argues that strategies include the provision of tax-funded paid parental leave for fathers as well as mothers.⁶³⁴ Through providing parental leave for fathers, the burden of childcare is more evenly distributed between mothers and fathers. Women thus have the opportunity to return to work and pursue further employment after having children. Men need to take responsibility for some of the non-monetised care work that women do. However, the majority of the work lies in changing social norms and addressing stereotypical gender roles.⁶³⁵ Elson's strategies of recognising, reducing and redistributing non-monetised care work should arguably be included in gender responsive budgeting initiatives to ensure women in the care economy are adequately protected.

4 2 2 6 *Access to justice*

In terms of article 15(1) of CEDAW, state parties shall ensure that women are equal with men before the law. The CEDAW Committee has acknowledged that women's right of access to justice is a fundamental component of CEDAW as it encompasses elements of the rule of law and good governance.⁶³⁶ Access to justice is essential to the provision of remedies for victims and the accountability of justice systems.⁶³⁷ Article 15 of CEDAW is complemented by article 2 which stipulates that state parties must take all appropriate measures to guarantee the substantive equality of men and women in all areas of life, which include the establishment of competent national tribunals and effective justice systems.⁶³⁸ Article 3 of CEDAW reiterates the need for state parties to take all appropriate measures, including legislation, to ensure women can exercise and enjoy fundamental human rights and freedoms on a basis of equality with men.

⁶³³ 57.

⁶³⁴ 57.

⁶³⁵ 58.

⁶³⁶ CEDAW Committee, General Recommendation 33 para 1.

⁶³⁷ Para 1.

⁶³⁸ Para 6.

An understanding of anti-essentialist feminist legal theory is equally relevant to the analysis of women's access to justice.⁶³⁹ Factors such as illiteracy, armed conflict, migration, widowhood, poverty, criminalisation of sex work, and geographical remoteness make it more difficult for women to gain access to justice.⁶⁴⁰ Thus state parties need to be cognisant of how these factors result in women being prevented from seeking justice or how "authorities frequently fail to act with due diligence to investigate, prosecute and punish perpetrators and/or provide remedies".⁶⁴¹ The CEDAW Committee reiterates that women may face discrimination based on their sex and gender.⁶⁴² Gender refers to the socially constructed identities, attributes and roles for women and men.⁶⁴³ Women are often discriminated against when seeking justice because of the perceived role that women must remain silent and obedient to men. Thus, as required by article 5(a) of CEDAW, state parties have an obligation to eliminate the underlying barriers which prevent women from exercising their rights and impede their access to effective remedies within the justice system.⁶⁴⁴

In the *RPB* communication, the CEDAW Committee noted how stereotyping could affect women's right to a fair and just trial.⁶⁴⁵ The court system had discriminated against the author, who was a rape victim, based on preconceived stereotypes of how rape victims should act when confronted with violence.⁶⁴⁶ The CEDAW Committee reiterated in *Angela González Carreño v Spain* that women who are victims of domestic violence also face discrimination in the judicial system.⁶⁴⁷ Stereotypes based on what domestic violence 'should look like' negatively affect women's right to a fair trial.⁶⁴⁸ The author in *RPB* also drew attention to the lack of assistance which victims with disabilities received during legal proceedings as she was deaf and mute.⁶⁴⁹ The lack of translation services and focus on the intersectionality of gender and disability

⁶³⁹ See chapter three part 3 3 above.

⁶⁴⁰ Para 9.

⁶⁴¹ Para 10.

⁶⁴² Para 7.

⁶⁴³ See chapter three part 3 4 2 and part 4 2 2 3 above for a further discussion on gender and the prohibition of harmful practices respectively.

⁶⁴⁴ CEDAW Committee, General Recommendation 33 para 7.

⁶⁴⁵ Communication No 34/2011, UN Doc CEDAW/C/57/D/34/2011 (21 February 2014) para 8.8. See part 4 2 2 2 above.

⁶⁴⁶ Para 8.8.

⁶⁴⁷ Communication No 47/2012, UN Doc CEDAW/C/58/D/47/2012 (15 August 2014) para 9.7.

⁶⁴⁸ Para 9.7.

⁶⁴⁹ *RPB v The Philippines* Communication No 34/2011, UN Doc CEDAW/C/57/D/34/2011 (21 February 2014) para 3.17.

resulted in a lack of understanding, from the perspective of the victim, of the proceedings.⁶⁵⁰ The CEDAW Committee recommended that the appropriate legislation should be reviewed to ensure that free and adequate interpreters were available if necessary during legal proceedings.⁶⁵¹ In the concluding observations on the state report of the Philippines, the CEDAW Committee reiterated that the justice systems need to undergo capacity-building programmes to strengthen gender responsiveness and gender sensitivity, especially focused on women who face intersecting forms of discrimination.⁶⁵²

In the concluding observations on the state report of the Bahamas, the CEDAW Committee expressed concern regarding women, especially those belonging to disadvantaged groups, not being aware of their rights under CEDAW and, thus, not being able to pursue the necessary justice.⁶⁵³ The CEDAW Committee recommended that the state party, in cooperation with civil society groups, enhance awareness of CEDAW and the remedies that are available to women.⁶⁵⁴ Concerning specific strategies, the CEDAW Committee, in the concluding observations on the state report of Costa Rica's state report, stated that access to justice should be guaranteed for indigenous women, women of African descent, refugee and asylum-seeking women, and women with disabilities by addressing language barriers and disseminating information about legal remedies available to women.⁶⁵⁵

In General Recommendation 33, the CEDAW Committee recommends that state parties provide adequate budgetary and technical assistance to all parts of the justice system which include specialised "judicial, quasi-judicial and administrative bodies, alternative dispute resolution mechanisms, national human rights institutions and ombudsperson offices".⁶⁵⁶ The provision of low-cost or free legal aid, advice and representation have been identified as a means for state parties to ensure that the justice systems are economically accessible to all women.⁶⁵⁷ The CEDAW Committee

⁶⁵⁰ Para 3.17.

⁶⁵¹ Para 9(b)(ii).

⁶⁵² CEDAW Committee *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of the Philippines* (2016) UN Doc CEDAW/C/PHL/CO/7-8 para 16(a) & (b).

⁶⁵³ CEDAW Committee *Concluding Observations on the Sixth Periodic Report of the Bahamas* (2018) UN Doc CEDAW/C/BHS/CO/6 para 13.

⁶⁵⁴ Para 14(c).

⁶⁵⁵ CEDAW Committee *Concluding Observations on the Seventh Periodic Report of Costa Rica* (2017) UN Doc CEDAW/C/CRI/CO/7 para 9(d).

⁶⁵⁶ CEDAW Committee, General Recommendation 33 para 39(a).

⁶⁵⁷ Para 36.

reiterated the need for the institutionalisation of legal aid clinics which are sensitive to the needs of diverse women.⁶⁵⁸ In the *X and Y* communication, the CEDAW Committee recommended that the state party ensure that judges, lawyers and law enforcement personnel receive mandatory training on zero-tolerance policies in respect of violence against women as well as the definition of domestic violence and gender stereotypes.⁶⁵⁹ This ensures that when women report violent crimes, they receive appropriate protection and access to justice. In terms of resource constraints in realising women's access to justice, the CEDAW Committee has specified that state parties must seek support from external sources, such as United Nations ("UN") specialised agencies, the international community and civil society to ensure that adequate resources are allocated to the justice systems.⁶⁶⁰

4 2 3 Implementation mechanisms

4 2 3 1 *Special measures*

Article 24 of CEDAW states that "state parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization in the present convention". This provision does not directly mention resources or budgeting, however, the instruction for all necessary measures to be adopted is arguably resource intensive for state parties. Most provisions in CEDAW also require state parties to take "all appropriate measures" to realise the right contained in that provision.⁶⁶¹ The CEDAW Committee has defined "measures" to include a "wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems".⁶⁶² The exact measures may change based on the context of the substantive equality goal, however, they will all have financial implications to a greater or lesser extent.

⁶⁵⁸ CEDAW Committee *Concluding Observations on the Seventh Periodic Report of Costa Rica* (2017) UN Doc CEDAW/C/CRI/CO/7 para 9(a).

⁶⁵⁹ Communication No 24/2009, UN Doc CEDAW/C/61/D/24/2009 (2015) para 11(b)(iv). See part 4 2 2 above for a further discussion on the *X and Y* communication.

⁶⁶⁰ CEDAW Committee, General Recommendation 33 para 39(b).

⁶⁶¹ The articles that require state parties to take "all appropriate measures" are articles 2-8, 10-14 and 16.

⁶⁶² CEDAW Committee, General Recommendation 25 para 22.

Article 4 of CEDAW relates to “temporary special measures aimed at accelerating de facto equality between men and women”. The CEDAW Committee has described these temporary special measures as being necessary to accelerate equal opportunities and to accelerate redistribution of power and resources.⁶⁶³ Article 4(1) states that these temporary special measures shall be ceased when the objectives of equality of opportunity and treatment have been achieved. In this regard, the CEDAW Committee has reiterated the importance of having a clear timeframe for any temporary special measures being implemented.⁶⁶⁴

General Recommendation 23 refers to temporary special measures such as financially assisting and training female candidates as necessary for women’s appointments to public positions within their government.⁶⁶⁵ The CEDAW Committee has recommended that temporary special measures, such as quotas and affirmative action, be utilised in areas where women are underrepresented or disadvantaged, such as in the labour market and political sphere.⁶⁶⁶ Along with implementing such measures, the CEDAW Committee has also emphasised that state parties must raise public awareness about the non-discriminatory nature and importance of such temporary special measures for promoting substantive equality.⁶⁶⁷

Elson argues that these temporary special measures provide opportunities and ensure the participation of women within the budgetary process.⁶⁶⁸ Women should be included to assist with budget formation, content and implementation. This is strengthened by article 7 of CEDAW, which refers to women having equal opportunity to participate in the political and public life of the country. General Recommendation 23 elaborates on this by stating that it refers to the exercise of legislative, judicial, executive and administrative powers which includes the “formulation and implementation of policy at international, regional, national and local levels”.⁶⁶⁹

⁶⁶³ Para 39.

⁶⁶⁴ CEDAW Committee *Concluding Observations on the Eight Periodic Report of the Republic of Korea* (2018) UN Doc CEDAW/C/KOR/CO/8 para 21.

⁶⁶⁵ CEDAW Committee, General Recommendation 23 *Political and Public Life* UN Doc A/52/38 (1997) para 15.

⁶⁶⁶ CEDAW Committee *Concluding Observations on the Fifth Periodic Report of Fiji* (2018) UN Doc CEDAW/C/FJI/CO/5 para 24.

⁶⁶⁷ Para 24.

⁶⁶⁸ Elson *Budgeting for Women’s Rights* 33. See chapter three part 3 4 4 above for a further discussion on women’s involvement in the budgeting process.

⁶⁶⁹ CEDAW Committee, General Recommendation 23 para 5.

4 2 3 2 *Budgeting in terms of CEDAW*

Gender responsive budgeting has been established as an effective way for state parties to meet their obligations in terms of CEDAW.⁶⁷⁰ Most state parties to CEDAW have implemented a form of gender responsive budgeting. However, when assessing state reports to the CEDAW Committee and concluding observations on those state reports, there are still discrepancies in how state parties budget to realise the rights in CEDAW and how the CEDAW Committee responds to these budgeting strategies. There is no particular gender responsive budgeting strategy which has been specifically developed by the CEDAW Committee for state parties to meet their obligations in terms of CEDAW.⁶⁷¹ However, the concluding observations on state reports give insight into what the CEDAW Committee expects from state parties when fulfilling their obligations towards women's rights. Byrnes argues that the CEDAW Committee's goal when considering state reports is to assess the actual situation in the country as well as identifying the progress that has been made and the obstacles that still need to be overcome.⁶⁷²

The CEDAW Committee acknowledges the significance of anti-essentialist feminist legal theory in state party budget formulation. This is, for example, evident in the concluding observations on the state report of Mali where the CEDAW Committee recommended that "women who are more vulnerable, such as women with disabilities and internally displaced women", need to be considered when formulating national budgets.⁶⁷³ The CEDAW Committee has also emphasised the imperative role that civil society plays in establishing gender responsive budgeting.⁶⁷⁴ In the concluding observations on the state report of Austria, the CEDAW Committee commended the establishment of gender responsive budgeting in all government sectors.⁶⁷⁵ The CEDAW Committee also recommended that Austria continue to allocate resources to the various bodies responsible for ensuring the execution of these budgets.⁶⁷⁶

⁶⁷⁰ Elson *Budgeting for Women's Rights* 32.

⁶⁷¹ 39.

⁶⁷² Byrnes "The Committee on the Elimination of Discrimination against Women" in *Women's Human Rights* 32.

⁶⁷³ CEDAW Committee *Concluding Observations on the Combined Sixth and Seventh Periodic Report of Mali* (2016) UN Doc CEDAW/C/MLI/CO/6-7 para 18(c).

⁶⁷⁴ CEDAW Committee *Concluding Observations on the Fourth Periodic Report of Côte d'Ivoire* (2019) UN Doc CEDAW/C/CIV/CO/4 para 22(c).

⁶⁷⁵ CEDAW Committee *Concluding Observations on the Ninth Periodic Report of Austria* (2019) UN Doc CEDAW/C/AUT/CO/9 para 14.

⁶⁷⁶ Para 15.

While the CEDAW Committee has praised some state parties on their gender responsive budgeting initiatives, concerns have been raised about the implementation of other strategies. The concluding observation for Guyana emphasised the lack of training and expertise among staff who were expected to implement gender responsive budgeting initiatives.⁶⁷⁷ The CEDAW Committee recommended that human, technical and financial resources should be increased to ensure substantive gender equality was being achieved through gender responsive budgeting.⁶⁷⁸

Elson suggests that when assessing gender responsive budgeting strategies, it is imperative to identify the different measures that state parties have utilised to fulfil their obligations in terms of CEDAW.⁶⁷⁹ In this regard, CEDAW provides for three different types of measures which should be implemented in the expenditure part of gender responsive budgeting. The first of these is general measures which improve the position of women and guarantee their full enjoyment of economic, social and cultural rights.⁶⁸⁰ The second type of measure is temporary special measures which accelerate the achievement of substantive equality between men and women.⁶⁸¹ The temporary special measures, as provided for in article 4(1) of CEDAW, do not constitute discrimination and they are to be discontinued when the desired goal of substantive equality has been reached.⁶⁸² The third type of measure is permanent gender-specific special measures necessitated by biological differences.⁶⁸³

These different kinds of measures can be utilised to realise any provision in CEDAW, including in the provisions as discussed above.⁶⁸⁴ The extensive work that has been carried out by scholars alongside the CEDAW Committee on resource allocation for the realisation of women's rights, can provide valuable insights into the interpretation of article 26(2) of the Maputo Protocol. Chapter 5 draws on these experiences to develop an appropriate interpretation of article 26(2) of the Maputo Protocol.

⁶⁷⁷ CEDAW Committee *Concluding Observations on the Ninth Periodic Report of Guyana* (2019) UN Doc CEDAW/C/GUY/CO/9 para 17(a).

⁶⁷⁸ Para 18(a).

⁶⁷⁹ Elson *Budgeting for Women's Rights* 50.

⁶⁸⁰ 50.

⁶⁸¹ 50.

⁶⁸² See part 4 2 3 1 above.

⁶⁸³ Elson *Budgeting for Women's Rights* 50.

⁶⁸⁴ See part 4 2 2 above.

4 3 Resource allocation under ICESCR

4 3 1 Article 2(1) of the ICESCR

Article 2(1) of the ICESCR states that “each party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”. It describes the nature of the general legal obligations of state parties to the ICESCR.⁶⁸⁵ Before analysing how state parties must meet their obligations in terms of article 2(1) of the ICESCR, the different norms mentioned in article 2(1) are defined and analysed below. The CESCR has sought to clarify states parties’ obligations in terms of defining maximum available resources, progressive realisation, retrogressive measures, minimum core obligations, extraterritorial obligations and non-discrimination. Similarly, to the CEDAW Committee,⁶⁸⁶ it has done so through statements, general comments and concluding observations on state party reports. While these documents are not legally binding in nature, they too hold persuasive value.⁶⁸⁷

4 3 1 1 *Maximum available resources*

General Comment 3, issued by the CESCR, elaborates on the obligations created by article 2(1). State parties can determine which measures are most appropriate to realise the rights in the ICESCR within the context of their country. The CESCR has stated that the mere adoption of legislative measures does not exhaust the obligations of state parties.⁶⁸⁸ The CESCR has also identified policy, judicial, administrative, financial, educational and social measures.⁶⁸⁹ O’Connell et al argue that no legislative or administrative measure carries as much significance as budgetary allocations,

⁶⁸⁵ CESCR General Comment 3 *The nature of states parties’ obligations* (1990) UN Doc E/1991/23 para 1 (“CESCR General Comment 3”).

⁶⁸⁶ See part 4 2 above.

⁶⁸⁷ B Saul, D Kinley & J Mowbray *The International Covenant on Economic, Social and Cultural Rights* (2014) 5. See also Liebenberg *Socio-Economic Rights* 107.

⁶⁸⁸ Para 4.

⁶⁸⁹ Paras 5, 6 and 7.

specifically in the realisation of socio-economic rights.⁶⁹⁰ To mobilise maximum available resources, state parties need to have progressive fiscal policies which consider the impact that implementation has on inequality and all groups of people.⁶⁹¹

State parties cannot escape their obligations in terms of the ICESCR solely on the grounds of a shortage of available resources.⁶⁹² In this regard, the CESCR has importantly stated that “budgetary constraints should not be invoked as the only justification for the lack of progress” when considering the rights in the ICESCR.⁶⁹³ The available resources include those within the state party as well as those available from the international community.⁶⁹⁴ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (“Limburg Principles”)⁶⁹⁵ state that when determining whether state parties have taken adequate measures and allocated effective resources for the realisation of the rights in the ICESCR, attention should be paid to the equitable distribution of these resources.⁶⁹⁶ The purpose of the Limburg Principles is to clarify the nature and scope of state parties’ obligations under the ICESCR.⁶⁹⁷ While the Limburg Principles are non-binding on state parties, they ensure that state parties better understand their obligation to prioritise economic, social and cultural rights.⁶⁹⁸ De Schutter argues that the Limburg Principles marked a crucial advancement in the understanding of economic, social and cultural rights due to the clarification of rights that were still largely unclear to state parties.⁶⁹⁹

⁶⁹⁰ R O’Connell, A Nolan, C Harvey, M Dutschke & E Rooney *Applying an International Human Rights Framework to State Budget Allocations* (2014) 66.

⁶⁹¹ CESCR *Concluding Observations on the Initial Report of South Africa* (2018) UN Doc E/C.12/ZAF/CO/1 para 16. See part 4 3 2 1 below for a further analysis of taxation policies and its effect on different groups of people.

⁶⁹² CESCR General Comment 11 *Plans of Action for Primary Education (Article 14 of the International Covenant on Economic, Social and Cultural Rights)* (1999) para 9 (“General Comment 11”).

⁶⁹³ CESCR *Concluding Observations on the Combined Second to Fourth Periodic Reports of the Democratic Republic of the Congo* (2009) UN Doc E/C.12/COD/CO/4 para 24.

⁶⁹⁴ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN Doc E/CN.4/1987/17 (1986) para 26. See part 4 3 1 5 below for a discussion on extra-territorial obligations.

⁶⁹⁵ UN Doc E/CN.4/1987/17 (1986).

⁶⁹⁶ Para 27.

⁶⁹⁷ F Coomans “The Limburg Principles Turned 30” (2016) *Maastricht University* <<https://www.maastrichtuniversity.nl/blog/2016/12/limburg-principles-turned-30>> (accessed 07-07-2020).

⁶⁹⁸ 1.

⁶⁹⁹ O De Schutter “The Rights-Based Welfare State: Public Budgets and Economic and Social Rights” (2018) *Friederich Ebert Stiftung* 9.

In terms of article 16 and 17 of the ICESCR, state parties are obliged to report to the CESCR on the measures they have taken to realise the rights in the ICESCR. By doing this, the CESCR can assess current initiatives and make recommendations to state parties in the concluding observations on state reports. The CESCR has described the objectives of state reporting as creating a platform to facilitate the exchange of information among state parties and a way for state parties to evaluate the extent to which progress has been made towards the progressive realisation of the rights in the ICESCR.⁷⁰⁰ The CESCR is also able to request budgetary alterations and express concern over insufficient resource allocations.⁷⁰¹ In the concluding observation on the combined initial, second and third periodic reports of Chad, the CESCR expressed concern over the lack of funding for social services, despite the available resources for it.⁷⁰²

The CESCR has drawn attention to where budget increases have not had the desired effect on the realisation of rights. This occurred when Paraguay increased their national health budget, yet the majority of people in the country did not have access to adequate health care.⁷⁰³ Such observations demonstrate that the CESCR is greatly concerned with the effect and implementation of resource allocation.

The CESCR has also raised concern over the non-consideration of state parties of the sufficiency of certain budgetary allocation to meet the number of beneficiaries requiring access to the rights. This is evident in the concluding observations on the state report of Angola where the CESCR noted that the budget allocation for education had decreased, despite the number of school-going children having increased.⁷⁰⁴ The CESCR expressed similar concern over insufficient work opportunities for men and women despite Angola's economic growth.⁷⁰⁵ In the concluding observations on Mauritius' state report, the CESCR stated that effective measures needed to be adopted to close the gender pay gap and eliminate gender stereotypes in the family

⁷⁰⁰ CESCR General Comment 1 *Reporting by State Parties* (1989) para 9 and 6. See part 4 3 1 2 below for a discussion on progressive realisation.

⁷⁰¹ L Chenwi "Monitoring the Progressive Realisation of Socio-Economic Rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court" (2010) *Research Paper Written for Studies in Poverty and Inequality Institute* 46.

⁷⁰² CESCR *Concluding Observations on the Combined Initial and Second and Third Periodic Reports of Chad* UN Doc E/C.12/TCD/CO/3 (2009) para 23.

⁷⁰³ CESCR *Concluding Observations on the Second and Third Periodic Reports of Paraguay* UN Doc E/C.12/PRY/CO/3 (2008) para 12(i).

⁷⁰⁴ CESCR *Concluding Observations on the Initial to Third Periodic Report of Angola* UN Doc E/C.12/AGO/CO/3 (2008) para 39.

⁷⁰⁵ Para 39.

and society.⁷⁰⁶ The measures which were suggested, such as career development opportunities and media campaigns, require a substantial resource input from the state.

In the concluding observations on the state report of Ukraine, the CESCR expressed concern regarding the persistent gender stereotypes which perpetuate gender inequality in the state party.⁷⁰⁷ These persistent gender stereotypes result in women, particularly those in vulnerable positions, to continue to bear the disproportionate burden of non-monetised care work.⁷⁰⁸ The CESCR recommended that the state party implement a gender responsive budgeting initiative which includes time-use surveys as a tool to measure the distribution of monetised and non-monetised care work between men and women.⁷⁰⁹

The above shows that there are extensive requirements as to how states should meet their obligations in terms of the ICESCR.⁷¹⁰ The CESCR also places great emphasis on whether state parties have made transparent and participative decisions.⁷¹¹ Chenwi argues that the obligation to allocate maximum available resources is also intertwined with the concepts of progressive realisation and minimum core obligations.⁷¹² Therefore, these concepts are discussed in turn.

4 3 1 2 *Progressive realisation*

Article 2(1) of the ICESCR encompasses the concept of progressive realisation. This means that economic, social and cultural rights are generally not capable of being achieved in a short period of time, however, there are some obligations that can be achieved immediately or over a shorter period of time, as discussed below.⁷¹³ The CESCR has clarified that the concept of progressive realisation requires state parties

⁷⁰⁶ CESCR *Concluding Observations on the Fifth Periodic Report of Mauritius* UN Doc E/C.12/MUS/CO/5 (2019) para 24(b) & (d).

⁷⁰⁷ CESCR *Concluding Observations on the Seventh Periodic Report of Ukraine* UN Doc E/C.12/UKR/CO/7 (2020) para 16.

⁷⁰⁸ Para 16

⁷⁰⁹ Para 17(b). See chapter three part 3 4 5 above for a discussion on gender responsive budgeting and time-use surveys.

⁷¹⁰ O'Connell et al *Applying an International Human Rights Framework to State Budget Allocations* 67.

⁷¹¹ CESCR General Comment 3 para 11.

⁷¹² Chenwi *Paper Written for Studies in Poverty and Inequality Institute* 10.

⁷¹³ CESCR General Comment 3 para 9.

to move as swiftly as possible towards the goal of full realisation of the rights in the ICESCR.⁷¹⁴

De Schutter argues that while the actual implications of progressive realisation are ambiguous, there are four norms which, to a certain extent, clarify the duty of progressive realisation.⁷¹⁵ The first norm is adapted from General Comment 19 and states that any deliberately retrogressive measures requires careful consideration and need to be fully justified by the state party in the context of the full use of the maximum available resources.⁷¹⁶ The second norm stipulates that when state parties are facing resource constraints, they should ensure the satisfaction of, at least, the minimum essential levels of each of the rights in the ICESCR.⁷¹⁷ This concept is reiterated in the Limburg Principles, which states that economic development must not affect the respect that the minimum essentials levels of economic, social and cultural rights should receive.⁷¹⁸

The third norm is that the rights in the ICESCR should be realised without discrimination.⁷¹⁹ This norm does not only speak to removing discriminatory legislation and policy, but it also requires state parties to constantly move towards the prioritisation and realisation of the rights of marginalised groups.⁷²⁰ De Schutter argues that the fourth norm for progressive realisation should be participation.⁷²¹ Participation is not a principle stipulated in the ICESCR, however, it is a significant principle within human rights law.⁷²² De Schutter reasons that participation is a necessary norm of progressive realisation because extensive consultation with civil society is needed to assess whether current budgetary allocations will realise the rights in the ICESCR.⁷²³ Participation also encourages accountability and

⁷¹⁴ Para 9.

⁷¹⁵ De Schutter (2018) *Friederich Ebert Stiftung* 10.

⁷¹⁶ CESCR, General Comment 19 *The Right to Social Security (Article 9)* (2008) para 41. Retrogressive measures are further discussed in part 4 3 1 3 below.

⁷¹⁷ CESCR General Comment 3 para 10. Minimum core obligations are further discussed in part 4 3 1 4 below.

⁷¹⁸ Limburg Principles para 25.

⁷¹⁹ Articles 2(2) and 3 of the ICESCR and CESCR General Comment 20 *Non-discrimination in economic, social and cultural rights (art.2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/2 (2009) ("General Comment 20"). See part 4 3 1 6 below for a discussion on non-discrimination and equality.

⁷²⁰ CESCR General Comment 20 para 8.

⁷²¹ De Schutter (2018) *Friederich Ebert Stiftung* 11.

⁷²² See chapter three part 3 4 4 above.

⁷²³ De Schutter (2018) *Friederich Ebert Stiftung* 12.

transparency.⁷²⁴ The CESCR has reiterated the importance of a transparent and participatory budgetary process when steps are taken to progressively realise the rights in the ICESCR.⁷²⁵ Transparency and participation are core human rights principles which also form part of gender responsive budgeting strategies.⁷²⁶

The CESCR has stated that the obligation to “take steps” acknowledges that while the full realisation of the rights in the ICESCR may be achieved progressively, there are steps that can be taken immediately.⁷²⁷ These steps need to be “deliberate, concrete and targeted” towards the full realisation of the rights in the ICESCR.⁷²⁸ Through this clarification, the CESCR ensures that state parties understand the short- and long-term obligations that are created under article 2(1) of the ICESCR. With regard to the right to education, the CESCR observed that state parties should prioritise the provision of free primary education and also mobilise resources to take concrete steps towards achieving free secondary and higher education.⁷²⁹ Thus, as Chenwi establishes, progressive realisation goes beyond resource allocation for achieving the minimum core levels of a right.⁷³⁰ Instead, progressive realisation encompasses a long-term approach to continuously strive for improvement of the enjoyment economic, social and cultural rights.

4 3 1 3 *Retrogressive measures*

Retrogressive measures require careful consideration and need to be fully justified “by reference to the totality of the rights” provided for in the ICESCR and the context of the full use of maximum available resources.⁷³¹ When assessing the validity of retrogressive measures taken by state parties, the CESCR has six considerations.⁷³² These considerations include whether there was reasonable justification for the action, alternatives were duly considered, there was genuine participation of affected groups

⁷²⁴ 12.

⁷²⁵ CESCR *Concluding Observations on the Initial Periodic Report of Mali* (2018) UN Doc E/C.12/MLI/CO/1 para 13.

⁷²⁶ See chapter three part 3 4 4 above for a discussion on civil society’s role in gender responsive budgeting.

⁷²⁷ CESCR General Comment 3 para 2.

⁷²⁸ Para 2.

⁷²⁹ CESCR General Comment 13 *The Right to Education (Article 13 of the Covenant)* UN Doc E/C.12/1999/10 (1999) para 14.

⁷³⁰ Chenwi *Paper Written for Studies in Poverty and Inequality Institute* 20.

⁷³¹ CESCR General Comment 3 para 9.

⁷³² CESCR General Comment 19 para 42.

examining the proposed measures, the measures were directly or indirectly discriminatory, the measures will have a sustained impact on economic, social and cultural rights, and whether there was an independent review of the measures at the national level.⁷³³ Part of the duty to realise the rights in the ICESCR progressively implies a heavy burden of justification on retrogressive measures.⁷³⁴ Any retrogressive measure needs to be considered and justified.⁷³⁵ These measures should also ensure that the rights of disadvantaged and marginalised groups are not adversely affected.⁷³⁶

Liebenberg argues that there should be heavier burdens of justification on state parties when retrogressive measures result in depriving marginalised and vulnerable groups of people of access to basic social services.⁷³⁷ For the adoption of retrogressive steps, the burden of proof rests on the state party to show that the action was justified and that full use was made of available resources.⁷³⁸ Should a state party use “resource constraints” as a defence for the implementation of retrogressive measures, then the CESCR has a set of considerations to take into account. These include the country’s level of development, the severity of the alleged retrogressive measures, the country’s economic situation, the existence of serious claims for limited resources, whether low-cost options had been sought, and whether the state party had sought aid and cooperation from the international community.⁷³⁹

Accordingly, the CESCR has stated that retrogressive measures should only remain in place insofar as they remain necessary and proportionate, they should ensure that the rights of disadvantaged and marginalised people are not disproportionately affected, and they should not affect the minimum core content of

⁷³³ Para 42.

⁷³⁴ OHCHR “Report on austerity measures and economic and social rights” (2013) *The Office of the United Nations High Commissioner for Human Rights* <https://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf> (accessed 07-07-2020).

⁷³⁵ CESCR General Comment 3 para 9.

⁷³⁶ Statement of UN Committee on Economic, Social and Cultural Rights (fifty-eighth session, 2016) *Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights* UN Doc E/C. 12/2016/1 para 4.

⁷³⁷ Liebenberg *Socio-Economic Rights* 190.

⁷³⁸ Statement of UN Committee on Economic, Social and Cultural Rights (thirty-sixth session, 2007) *An evaluation of the obligation to take steps to the “maximum available resources” under an optional protocol to the covenant* UN Doc E/C. 12/2007/1 para 9.

⁷³⁹ Para 10.

the rights under the ICESCR.⁷⁴⁰ The CESCR has also specified this in the concluding observations on the state report of Bulgaria where it was stated that retrogressive measures, if unavoidable, must only remain in place insofar as they are necessary and they must not result in discrimination.⁷⁴¹ In the concluding observations on the state report of Argentina, the CESCR recommended that during periods of austerity, retrogressive measures should be avoided if possible and if these cannot be avoided, the national budget should be implemented to reflect a “human rights and gender-sensitive approach”.⁷⁴² In this way, the CESCR expresses the significance of a gender-responsive approach to budgeting.

Retrogressive measures also cannot solely be justified on an existing armed conflict where more resources are being redirected to military spending.⁷⁴³ The CESCR reiterated this in its concluding observations on the state report of the Democratic Republic of the Congo.⁷⁴⁴ The CESCR found there to be a mismanagement of resources and international aid as there had been a decrease in budgetary allocations to social sectors while there was an increase in defence budgetary allocations.⁷⁴⁵ However, when assessing periods of armed conflict and retrogressive measures, the CESCR will consider each state party’s budgetary allocations individually.⁷⁴⁶

The CESCR addressed retrogressive measures in *Djazia and Bellili v Spain* (“*Djazia*”)⁷⁴⁷ where it concluded that all budgetary adjustments affecting the rights in the ICESCR must be “temporary, necessary, proportional and non-discriminatory.”⁷⁴⁸ This case dealt with the right to adequate housing as well as the importance of special protection for vulnerable groups.⁷⁴⁹ *Djazia and Bellili* had been evicted, along with their

⁷⁴⁰ *Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights* para 4.

⁷⁴¹ CESCR *Concluding Observations on the Sixth Periodic Report of Bulgaria* (2019) UN Doc E/C.12/BGR/CO/6 para 9.

⁷⁴² CESCR *Concluding Observations on the Fourth Periodic Report of Argentina* (2018) UN Doc E/C.12/ARG/CO/4 para 6(d).

⁷⁴³ *Protection of Economic, Social and Cultural Rights in Conflict* Report of the United Nations High Commissioner for Human Rights, UN Doc E/2015/59 (2015) para 26.

⁷⁴⁴ CESCR *Concluding Observations on the Combined Second to Fourth Periodic Reports of the Democratic Republic of the Congo* (2009) UN Doc E/C.12/COD/CO/4.

⁷⁴⁵ Para 16.

⁷⁴⁶ S Yeshanew “Combining the ‘minimum core’ and ‘reasonableness’ models of reviewing socio-economic rights” (2008) 9 *ESR Review* 8 12.

⁷⁴⁷ *Djazia and Bellili v Spain* (2017) “Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015” UN Doc E/C.12/61/D/5/2015.

⁷⁴⁸ Para 17.6.

⁷⁴⁹ The right to adequate housing as in art 11(1) of the ICESCR.

two small children, from their private rental housing in Spain.⁷⁵⁰ General Comment 7 refers to forced evictions as a negative obligation on state parties.⁷⁵¹ Negative obligations are often considered absent of resource allocations, as state parties are obligated to refrain from performing them.⁷⁵² Thus, the state party's obligation to respect the rights to adequate housing can also include non-resource intensive considerations. The decision in *Djazia* is considered significant because of the focus on realising the right to adequate housing during an economic crisis.⁷⁵³

The family, in *Djazia*, had been severely affected by the economic crisis in Spain and had repeatedly been denied social housing.⁷⁵⁴ The CESCR stated that the obligation to provide adequate housing must be fulfilled through measures that are deliberate, specific and as straightforward as possible to ensure this right.⁷⁵⁵ General Comment 7 elaborates that state parties must take all appropriate measures, to the maximum of available resources, to ensure that those that have been affected by evictions have access to adequate alternative housing.⁷⁵⁶ The CESCR stated that despite an economic crisis, there were measures, such as the formulation of an emergency housing plan, which the state party could have taken to ensure that economically vulnerable families had access to adequate housing.⁷⁵⁷ Spain was furthermore not able to explain to the CESCR why it sold part of the public housing stock to private companies, significantly decreasing the availability of public housing in times of an economic downturn.⁷⁵⁸ The sale of the public housing was considered retrogressive measures which were not temporary or necessary as required.⁷⁵⁹ The state party had thus not sufficiently justified the measures taken to ensure adequate housing.

⁷⁵⁰ *Djazia and Bellili v Spain* (2017) para 2.8.

⁷⁵¹ CESCR General Comment 7 *The Right to Adequate Housing (Art. 11.1): Forced Evictions* UN Doc E/1998/22 (1997) para 8 ("General Comment 7").

⁷⁵² Chenwi *Paper Written for Studies in Poverty and Inequality Institute* 16.

⁷⁵³ ESCR-Net "Mohamed Ben Djazia and Naouel Bellili v. Spain, CESCR, Communication No. 5/2015, UN Doc. E/C.12/61/D/5/2015 (20 June 2017)" (2017) *ESCR-Net* <<https://www.escr-net.org/caselaw/2017/mohamed-ben-djazia-and-naouel-bellili-v-spain-cescr-communication-no-52015-un-doc>> (accessed 07-07-2020).

⁷⁵⁴ *Djazia and Bellili v Spain* (2017) para 2.9.

⁷⁵⁵ Para 15.3.

⁷⁵⁶ CESCR General Comment 7 para 16.

⁷⁵⁷ *Djazia and Bellili v Spain* (2017) para 17.5.

⁷⁵⁸ Para 17.5.

⁷⁵⁹ Para 17.6.

4 3 1 4 *Minimum core obligations*

The CESCR has established that state parties have a minimum core obligation to ensure the satisfaction of the minimum essential levels of each of the rights in the ICESCR.⁷⁶⁰ The CESCR has stated that resource constraints need to be taken into consideration to assess whether the states have discharged their minimum core obligation.⁷⁶¹ However, there is a “heavy burden of justification” on the state to show that it has exhausted its resources to fulfil its minimum core obligation.⁷⁶² The Limburg Principles also state that the minimum subsistence of all rights needs to be met, regardless of economic development.⁷⁶³ In this regard, it is necessary to establish whether the state has taken all available steps to the maximum of its available resources as per article 2(1) of the ICESCR. The CESCR has the ultimate say as to whether state parties have undertaken all appropriate means to realise the rights in the ICESCR.⁷⁶⁴

The CESCR has also noted that the states’ core obligation in terms of the ICESCR is not eliminated as a result of resource constraints.⁷⁶⁵ Should a state party attribute the failure to meet the minimum core obligation to resource constraints, then the state party must demonstrate to the CESCR that every effort has been made to use all the available resources in an attempt to meet its obligations.⁷⁶⁶ The only way for a state party to show that it has attempted to realise the rights to the maximum of its available resources is to show that it has made every effort to satisfy its obligations as a matter of priority in terms of the ICESCR.⁷⁶⁷ Therefore, the burden of proof rests on the state party to demonstrate why it is unable to shift its resources (such as resources used for military expenditure) to ensure that its minimum core obligations are met.⁷⁶⁸

State parties must specifically ensure that the poorest and most vulnerable citizens are not further deprived of their most essential economic, social and cultural rights during times of austerity.⁷⁶⁹ The CESCR has reiterated that where a state party uses

⁷⁶⁰ CESCR General Comment 3 para 10.

⁷⁶¹ Para 10.

⁷⁶² Liebenberg *Socio-Economic Rights* 149.

⁷⁶³ Limburg Principles para 25.

⁷⁶⁴ CESCR General Comment 3 para 4.

⁷⁶⁵ Para 11.

⁷⁶⁶ Para 10.

⁷⁶⁷ Para 6.

⁷⁶⁸ Saul, Kinley & Mowbray *The International Covenant on Economic, Social and Cultural Rights* 147.

⁷⁶⁹ 145.

resource constraints or severe economic recession as a reason for not meeting their obligations in terms of the ICESCR, the most vulnerable members of society still need to be protected through the adoption of relatively low-cost programmes.⁷⁷⁰ These programmes need to be aimed at ensuring that individuals have access to essential foodstuff, essential primary health care, basic shelter and housing, and basic forms of education.⁷⁷¹ In the concluding observations on the state report of Jamaica, the CESCR argued that it is precisely during periods of resource constraints that the ICESCR “should assume its most important function – that of a last-ditch defence for the most vulnerable”.⁷⁷²

Campbell argues that the minimum core obligation is currently loosely defined in practice.⁷⁷³ Thus, state parties are left uncertain as to where to allocate their resources to meet their minimum core obligations in terms of the ICESCR. Young suggests that the lack of firm definitions have led to core obligations being identified under specific rights in the ICESCR.⁷⁷⁴ In terms of just and fair working conditions, the core obligations include minimum wages, health and safety policies, and working standards.⁷⁷⁵ In terms of sexual and reproductive rights, the core obligations include the equal provision of health services and medicines.⁷⁷⁶ Campbell states further that the lack of unifying principles between these core obligations make it difficult for state parties to ascertain their exact minimum core obligations.⁷⁷⁷ However, as reiterated by the CESCR, the main focus of minimum core obligations should always be to ensure that the most vulnerable members of society have access to the most essential rights in the ICESCR.

⁷⁷⁰ CESCR General Comment 3 paras 12.

⁷⁷¹ Para 10.

⁷⁷² CESCR *Consideration of Report Submitted by State Party: Jamaica* UN Doc E/C.12/1990/SR.15 (1990) para 7.

⁷⁷³ M Campbell *Women, Poverty, Equality: The Role of CEDAW* (2018) 121.

⁷⁷⁴ KG Young “The Minimum Core of Economic and Social Rights: A Concept in Search of Content” (2008) 33 *Yale Journal of International Law* 113 152.

⁷⁷⁵ CESCR *General Comment 23 on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) UN Doc E/C.12/GC/23 para 65.

⁷⁷⁶ CESCR *General Comment 22 on the Right to Sexual and Reproductive Rights (Article 12 of the International Covenant on Economic, Social and Cultural Rights)* (2016) UN Doc E/C.12/GC/22 para 49.

⁷⁷⁷ Campbell *Women, Poverty, Equality* 122.

4 3 1 5 *Extraterritorial obligations*

Article 2(1) of the ICESCR provides that state parties are obligated to take states, individually and through international assistance and cooperation, to realise the rights in the ICESCR. The CESCR has interpreted maximum available resources as the resources both existing within the state as well as those that could be received through international assistance.⁷⁷⁸ Thus, international assistance and cooperation for “the development and thus for the realization of economic, social and cultural rights is an obligation of all States”.⁷⁷⁹ Article 23 of the ICESCR states that international cooperation includes the adoption of recommendations, conclusion of conventions as well as technical assistance. General Comment 11 reiterates that when “a state party is lacking financial resources or expertise to fully realise the rights” in the ICESCR, the “international community has a clear obligation to assist”.⁷⁸⁰

The CESCR has reiterated that where a state party relies on resource constraints as a reason for not being able to realise economic, social and cultural rights to the maximum of its available resources, the CESCR will consider whether that state party has sought international aid.⁷⁸¹ The CESCR will look particularly at where international aid was requested and whether any assistance or offers of resources were rejected by state parties.⁷⁸² The CESCR has stated that when international cooperation is undertaken, a sustainable framework on the use of aid must be developed.⁷⁸³ If a state party does not develop such a framework, it is in breach of its obligation to allocate maximum available resources to the realisation of the rights in the ICESCR.⁷⁸⁴

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (“Maastricht Principles”) elaborate on state parties’ extraterritorial obligations in terms of the ICESCR.⁷⁸⁵ As stated in the

⁷⁷⁸ Statement of UN Committee on Economic, Social and Cultural Rights (thirty-sixth session, 2007) *An evaluation of the obligation to take steps to the “maximum available resources” under an optional protocol to the covenant* UN Doc E/C. 12/2007/1 para 5.

⁷⁷⁹ CESCR General Comment 3 para 14.

⁷⁸⁰ CESCR General Comment 11 para 9.

⁷⁸¹ *An evaluation of the obligation to take steps to the “maximum available resources” under an optional protocol to the covenant* para 10(f).

⁷⁸² Para 10(f).

⁷⁸³ CESCR *Concluding Observations on the Combined Second to Fourth Periodic Reports of the Democratic Republic of the Congo* UN Doc E/C.12/COD/CO/4 (2009) para 16.

⁷⁸⁴ Para 16.

⁷⁸⁵ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) *ETO Consortium* <https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23> (accessed 07-07-2020).

introduction of the Maastricht Principles, they are designed to clarify the extraterritorial obligations of state parties in terms of existing international law. In terms of the Maastricht Principles, state parties are obligated to take action individually, and through international cooperation, to create enabling environments where economic, social and cultural rights can be fulfilled.⁷⁸⁶ They need to realise these rights separately, to the maximum to their ability and then, where necessary, contribute to the fulfilment of economic, social and cultural rights extraterritorially.⁷⁸⁷ Principle 31 clarifies that the extraterritorial obligation should be proportionate to the state parties' economic, technical and technological capacities, available resources, and influence in international decision-making processes. The extraterritorial fulfilment of economic, social and cultural rights should also prioritise the rights of disadvantaged, marginalised and vulnerable groups.⁷⁸⁸

Principle 31 recognises that the obligation to cooperate internationally and fulfil economic, social and cultural rights is not something that one state party can do in isolation.⁷⁸⁹ State parties need to enter into international agreements which can hold all participants accountable. Principle 31 also links with Article 2(1) of the ICESCR, which reiterates that the state parties which have particular extraterritorial obligations are those which have the economic and technical capacity.⁷⁹⁰ Thus, those state parties which have abundant available resources have particular extraterritorial obligations to assist those who do not have the same capacity.⁷⁹¹ De Schutter et al argue that since Principle 31 of the Maastricht Principles clarifies that, "states must cooperate to mobilise the maximum of available resources for the universal fulfilment of economic, social and cultural rights", a state party is not relieved of its obligation to realise economic, social and cultural rights simply due to a lack of resources.⁷⁹² Consequently, state parties can be held liable for a failure to seek necessary resources extraterritorially.

⁷⁸⁶ Principle 29.

⁷⁸⁷ Principle 31.

⁷⁸⁸ Principle 32(a).

⁷⁸⁹ O de Schutter, A Eide, A Khalfan, M Orellana, M Salomon & I Seiderman "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2012) 34 *Human Rights Quarterly* 1084 1151.

⁷⁹⁰ 1152.

⁷⁹¹ 1153.

⁷⁹² 1154.

4 3 1 6 *Non-discrimination and equality*

Article 2(2) of the ICESCR states that “state parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. State parties are thus obligated to ensure that all rights in the ICESCR are exercised in a way that prohibits any discrimination, whether in law or fact, whether direct or indirect on the prohibited grounds listed in article 2(2).⁷⁹³ The CESCR reiterated that article 2(2) is an obligation that state parties have to exercise immediately.⁷⁹⁴

The ICESCR contains the right to non-discrimination based on various grounds, *inter alia* non-discrimination based on sex.⁷⁹⁵ Furthermore, the non-discriminative clause is complemented by the right of every woman to the equal enjoyment of all the rights contained in the ICESCR.⁷⁹⁶ The basis for a gender responsive budgeting and feminist legal theory analysis can be found in General Comment 16 where measures such as “gender-specific allocation of resources” and “equality in the allocation of resources” are addressed.⁷⁹⁷ General Comment 16 deals specifically with the equal right of men and women to the enjoyment of all economic, social and cultural rights.⁷⁹⁸

General Comment 20 also elaborates on the duty of state parties to apply the ICESCR based on the principle of non-discrimination.⁷⁹⁹ General Comment 22, on the rights to health care as per article 12 of the ICESCR, reiterates that state parties have a duty to ensure all women have equal access to sexual and reproductive health care. This is particularly important for women with disabilities, migrant workers, women facing sexual harassment in the workplaces, or women being discriminated against based on pregnancy, childbirth, parenthood, sexual orientation, gender identity or intersex status.⁸⁰⁰

⁷⁹³ CESCR General Comment 19 para 29.

⁷⁹⁴ Para 40.

⁷⁹⁵ Article 2(2) of the ICESCR.

⁷⁹⁶ Article 3.

⁷⁹⁷ UN Committee on Economic, Social and Cultural Rights, General Comment 16 (thirty fourth session, 2005) *The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/2005/4 para 21 & 22.

⁷⁹⁸ CESCR General Comment 16.

⁷⁹⁹ UN Committee on Economic, Social and Cultural Rights, General Comment 20 (forty second session, 2009) *Non-discrimination in economic, social and cultural rights (Art. 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/20.

⁸⁰⁰ CESCR, General Comment 22 para 6.

State parties have a greater obligation to take measures which ensure that vulnerable or marginalised groups have access to their rights in terms of the ICESCR.⁸⁰¹ State parties need to take positive action which includes special measures and additional resource allocation to ensure the empowerment of vulnerable groups.⁸⁰² The CESCR has stated, in concluding observations on state reports, that marginalised groups of people require a state party's full commitment to ensuring that legislation and policy are non-discriminative and inclusive. By doing so, the CESCR has guided them to ensure that their resources are focused on the rights of the most vulnerable. The CESCR has, for example, identified budgetary allocations for the implementation of comprehensive housing plans for low-income families⁸⁰³ as well as the protection of the socio-economic rights of marginalised groups of people.⁸⁰⁴

In the *Marcia Cecilia Trujillo Calero v Ecuador* ("Calero")⁸⁰⁵ case, the CESCR elaborated on state parties' obligation to ensure that women, especially women who are part of the non-monetised care work economy, are not discriminated against when receiving social security.⁸⁰⁶ The author of the communication was a voluntary affiliate of the social security system in Ecuador. She contributed to this fund because she worked as an "unpaid domestic worker" responsible for the care of her home and her three minor children.⁸⁰⁷ The Ecuadorian Social Security Institute rejected the author's application for a retirement pension on the grounds that she had not made enough monthly contributions to the fund.⁸⁰⁸ The author learned in 2007 that the payments she had made between 1989 and 1995 had been invalid, though this information had never been communicated to her when she was making the payments.⁸⁰⁹

The author, in *Calero*, who was left unemployed, impoverished and facing serious health problems due to no retirement money, had also unsuccessfully sought relief

⁸⁰¹ Chenwi *Paper Written for Studies in Poverty and Inequality Institute* 20.

⁸⁰² CESCR General Comment 5 *Persons with Disabilities* UN Doc E/1995/22 (1994) para 9.

⁸⁰³ CESCR *Concluding Observations on the Combined Initial and Second and Third Periodic Reports of Chad* UN Doc E/C.12/TCD/CO/3 (2009) para 27.

⁸⁰⁴ CESCR *Concluding Observations on the Combined Initial and Second to Fourth Periodic Reports of Cambodia* UN Doc E/C.12/KHM/CO/1 (2009) para 38.

⁸⁰⁵ Views adopted by the Committee under the Optional Protocol to the Covenant concerning communication No. E/C.12/63/D/10/2015 (2018).

⁸⁰⁶ See part 4 2 2 5 above on what non-monetised care work is as well as how it has been addressed under CEDAW.

⁸⁰⁷ Para 2.1.

⁸⁰⁸ Para 2.4.

⁸⁰⁹ Para 2.3.

from the National Court of Justice and the Constitutional Court.⁸¹⁰ She claimed that the state party violated her right to social security as protected under article 9 of the ICESCR.⁸¹¹ The author also referred to article 2(2) of the ICESCR and stated that she was “part of a generation of women who dedicated the majority of their lives to non-monetised care work and who faced greater obstacles than men in accessing their right to social security”.⁸¹² Women who partake in non-monetised care work do not have an employment relationship, which provides them direct access to these social security schemes, and thus often make use of voluntary affiliations regimes. Non-monetised care workers need to make contributions to these funds to access the benefits, despite not having a fixed income.⁸¹³ Thus, *Calero* addresses the indirect discrimination against women that can occur in social security schemes. This discrimination is also aggravated in the case of older women who wish to access social security and retirement funds.⁸¹⁴

The CESCR stated that the right to social security, under article 9 of the ICESCR carries significant financial implications for state parties. The CESCR reiterated that state parties are obligated to ensure the satisfaction of, at least, the minimum core levels of this rights, without discrimination of any kind.⁸¹⁵ State parties need to take effective measures, to the maximum of available resources, to fully realise the right of all persons without discrimination to social security. This entails ensuring that public policies and legislation pertaining to social security take account of the unique circumstances and inequalities faced by women who do non-monetised care work.⁸¹⁶ This is particularly significant because of the persistence of gender stereotypes which result in women spending more time than men doing non-monetised work and, subsequently, cannot make equal contributions to social security schemes.⁸¹⁷ Measures, such as non-contributory schemes, ensure that women in non-monetised care work are not forced into poverty during retirement.⁸¹⁸

⁸¹⁰ Paras 3.6 and 2.9.

⁸¹¹ Para 3.1.

⁸¹² Para 3.4.

⁸¹³ Para 3.5.

⁸¹⁴ Para 7.2.

⁸¹⁵ Para 11.2.

⁸¹⁶ Para 13.3.

⁸¹⁷ Para 13.4.

⁸¹⁸ CESCR General Comment 19 para 32.

The CESCR concluded that the denial of special retirement for the author of *Calero* constituted a violation of the right to social security in article 9 of the ICESCR. The conditions of the voluntary retirement scheme, which resulted in a non-monetised care worker's affiliation and contributions being invalid, constituted discriminatory treatment in violation of articles 2(2), 3 and 9.⁸¹⁹ The CESCR recommended that the state party adopt appropriate legislation to ensure the right of all affiliates to request, seek and receive information on their right to social security.⁸²⁰ Affiliates of social security schemes are also entitled to timely and appropriate information on their affiliation status and validity of contributions.⁸²¹ The CESCR also recommended the state party take relevant special measures to ensure that men and women enjoy an equal right to social security and a comprehensive non-contributory benefits plan is formulated to the maximum available resources.⁸²² Thus, this communication demonstrated that special measures and resources need to be allocated to ensure that women do not face indirect discrimination because they participate in non-monetised care work. This conclusion by the CESCR is also reiterated in General Comment 19 where it declares that state parties must take steps to the maximum of their available resources to ensure that social security schemes adequately cover non-monetised care workers.⁸²³

4 3 2 Allocating resources for the realisation of the rights in the ICESCR

State parties must generate and spend maximum available resources to realise the rights in the ICESCR. The generating and spending of resources forms part of the allocation of maximum available resources. Sub-section 4 3 1 above clarified the various norms stipulated in article 2(1) of the ICESCR, which provide the background to how state parties must interpret their obligations under the ICESCR. Sub-section 4 3 2 below, considers the best strategies to generate and spend maximum available resources to progressively realise the rights in the ICESCR. De Schutter's work is focused on in this regard as he provides the most recent and comprehensive analysis on mobilising resources for state parties to realise their obligations in terms of article 2(1) of the ICESCR. Other relevant sources such as the work of the Special

⁸¹⁹ *Marcia Cecilia Trujillo Calero v Ecuador* CESCR, Communication 10/2015, UN Doc. E/C.12/63/D/10/2015 (26 March 2018) para 21.

⁸²⁰ Para 23(a).

⁸²¹ Para 23(b).

⁸²² Para 23(e) and (f).

⁸²³ CESCR General Comment 19 para 33.

Rapporteur on Extreme Poverty and Human Rights (“Special Rapporteur on Extreme Poverty”),⁸²⁴ the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (“Maastricht Guidelines”),⁸²⁵ the OPERA framework as developed by the Centre for Economic and Social Rights in New York (“CESR”),⁸²⁶ and concluding observations on state reports made by the CESCR are also consulted to ensure a thorough evaluation of mobilising resources for the realisation of economic, social and cultural rights.

4 3 2 1 *Generating resources to realise economic, social and cultural rights*

This sub-section focuses on the work of De Schutter, in providing state parties with practical resource generation strategies.⁸²⁷ He argues that when considering the realisation of the rights in the ICESCR, the generation of resources and spending strategies need to complement one another, in order to produce the most effective outcomes.⁸²⁸ In describing the significance of this complementarity, De Schutter states:

“It may be tempting to think that a State making a smart use of its resources could be excused for maintaining a regressive tax structure or, conversely, that a State efficiently mobilising resources could be allowed to squander (within reasonable limits) some of these resources in unwise spending choices. Such an approach, however, would not do justice to the norm of progressive realization embodied in Article 2, para. 1 of the Covenant, which requires that States do everything they can to realise the Covenant rights, both at the collecting and at the spending sides of the equation.”⁸²⁹

Consequently, resource generation, public spending, and outcomes are interdependent and comprehensive strategies are needed to ensure all three areas are managed efficiently. De Schutter warns that even where one area is supposedly

⁸²⁴ The mandate of the Special Rapporteur on Extreme Poverty and Human Rights includes identifying approaches for removing obstacles to the full enjoyment of human rights for people living in extreme poverty and studying the impact discrimination and extreme poverty have on vulnerable groups. See full objectives and mandate: <https://www.ohchr.org/en/issues/poverty/pages/srextremepovertyindex.aspx>.

⁸²⁵ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) IPASA <<http://ipasa.co.za/Downloads/Patient%20Rights/Maastricht%20Guidelines%20on%20Socio-Economic%20Rights.pdf>> (accessed 07-07-2020).

⁸²⁶ OPERA stands for “outcomes, policy efforts, resources and assessment”.

⁸²⁷ De Schutter (2018) *Friederich Ebert Stiftung*.

⁸²⁸ 22.

⁸²⁹ 23.

not needed, then the results would be fragile and unsustainable.⁸³⁰ An example would be where outcomes have been achieved in education without effective public resources being invested

As discussed in chapter 3, taxation and international support are two of the main ways in which state parties mobilise public revenue.⁸³¹ As argued above, taxation and international support form an integral part of most gender responsive budgeting strategies.⁸³² Considering taxation, De Schutter argues that there are three considerations which could guide the CESCR's assessment of the taxation structure adopted by state parties to realise the rights in the ICESCR. These three considerations include the expansion of the tax base, a progressive tax structure, and the combatting of tax evasion.⁸³³

The broadening of the tax base is necessary to ensure adequate funding for the realisation of economic, social and cultural rights.⁸³⁴ De Schutter states that it is a misconception that poorer countries cannot rely on an increase in taxation to increase public revenue.⁸³⁵ The tax base in poorer countries is generally so low that adequate resources and the redistribution of wealth cannot be generated and achieved. Therefore, the tax base needs to be proportionately raised among the higher income brackets in order to encourage economic growth.⁸³⁶ De Schutter argues that the most effective way to raise the tax base is to eliminate favourable tax treatment to foreign investors to attract capital.⁸³⁷ Favourable tax treatment has been shown to have little to no impact on the amount of foreign investment, instead, foreign investment is encouraged by market size, fairer trade policies and skilled labour.⁸³⁸ Moreover, the CESCR has reiterated the significant role which corporate income tax can play in generating public revenue. In the concluding observations on the state report of Mauritius, it recommended that the role of corporate tax be re-examined, as a low rate

⁸³⁰ 23.

⁸³¹ See chapter three part 3 4 5 for a discussion on public revenue strategies within gender responsive budgeting.

⁸³² See chapter three part 3 4 5.

⁸³³ De Schutter (2018) *Friederich Ebert Stiftung* 27.

⁸³⁴ 27.

⁸³⁵ 27.

⁸³⁶ 27.

⁸³⁷ 28.

⁸³⁸ O De Schutter, JF Swinnen and J Wouters "Introduction" in O De Schutter et al (eds) *Foreign Direct Investment and Human Development* (2012) 1 2.

ultimately makes it difficult for the state party to fulfil its obligations in terms of the ICESCR.⁸³⁹

In respect of progressive tax structures, a former Special Rapporteur on Extreme Poverty has stated that tax systems need to have real redistributive power that preserves, as well as progressively increases the household income of poorer groups.⁸⁴⁰ A flat tax system where all people are required to pay an equal proportion of their income discourages substantive equality and limits the redistributive function which taxation could have.⁸⁴¹ Another former Special Rapporteur on Extreme Poverty reiterated this point and added that a country's tax policy is, in many respects, a human rights policy.⁸⁴² This is due to a tax policy shaping the allocation of income and assets and, ultimately, affecting the levels of inequality and human rights enjoyment.⁸⁴³

The CESCR, in the concluding observations on state reports to Cameroon and Pakistan, reiterated that indirect taxation limits a state party's ability to reduce high levels of inequality and recommended that progressive taxation strategies are needed.⁸⁴⁴ In the concluding observations on the state report of the Russian Federation, the CESCR expressed concern over a flat-rate tax system, which was applied to both personal and corporate income, contributing to increasing social inequalities.⁸⁴⁵ Thus, state parties should re-examine their taxation systems to ensure their policies reflect human rights principles. De Schutter argues that this can be achieved through considering the impact that indirect tax (such as valued added tax) have on poorer households and eliminating the idea that higher corporation tax discourages foreign investment.⁸⁴⁶ In the concluding observations on the state report of South Africa, the CESCR emphasised the redistributive capacity that progressive

⁸³⁹ CESCR *Concluding Observations on the Fifth Periodic Report of Mauritius* UN Doc E/C.12/MUS/CO/5 (2019) para 13.

⁸⁴⁰ MS Carmona *Report of the Special Rapporteur on Extreme Poverty and Human Rights* (2014) UN Doc A/HRC/26/28 para 16.

⁸⁴¹ Para 16.

⁸⁴² P Alston *Report of the Special Rapporteur on Extreme Poverty and Human Rights* (2015) UN Doc A/HRC/29/31 para 53.

⁸⁴³ Para 53.

⁸⁴⁴ CESCR *Concluding Observations on the Fourth Periodic Report of Cameroon* (2019) UN Doc E/C.12/CMR/CO/4 paras 14-15; CESCR *Concluding Observations on the Initial Report of Pakistan* (2017) UN Doc E/C.12/PAK/CO/1 paras 15-16.

⁸⁴⁵ CESCR *Concluding Observations on the Sixth Periodic Report of the Russian Federation* (2017) UN Doc E/C.12/RUS/CO/6 para 16.

⁸⁴⁶ De Schutter (2018) *Friederich Ebert Stiftung* 32.

taxation can have.⁸⁴⁷ South Africa is among the most unequal countries in the world, consequently, the CESCR recommended that a serious review of the impact of an increase in value-added tax on low-income households is done.⁸⁴⁸ The current taxation policy in South Africa also needs to be assessed with the view to improve its capacity to mobilise domestic resources to increase its redistributive effect.⁸⁴⁹

De Schutter states that tax evasion represents a huge financial loss to countries and has a major effect on poorer countries.⁸⁵⁰ A former Special Rapporteur on Extreme Poverty mentioned that any state party that does not take strong measures to address tax evasion is not abiding by their obligation to mobilise resources to the maximum of their available resources to realise economic, social and cultural rights.⁸⁵¹ Tax abuse also undermines the principles of equality and non-discrimination as tax evaders end up paying less than individuals with the same or less capacity to pay.⁸⁵² Tax abuse by wealthy individuals and corporations also force state parties to increase other modes of taxation, such as indirect tax, which results in the countries' taxation burden falling hardest on the poor.⁸⁵³ In this way, policies against tax evasion need to be cognisant of multiple layers of discrimination because the consequences thereof have detrimental effects on women, who buy most of the household items for poorer families, as well as poorer communities in general.⁸⁵⁴

Referring to Africa in particular, De Schutter suggests that tax evasion has resulted in an estimated loss of between USD 859 billion and USD 1.06 trillion between 1970 and 2008.⁸⁵⁵ Thus, tax evasion affects African states' ability to realise the economic, social and cultural rights of its people, and as the African Commission has argued, it undermines their capacity to implement the ACHPR and the Maputo Protocol.⁸⁵⁶ Therefore, state parties need to examine their national tax legislation and policies to

⁸⁴⁷ CESCR *Concluding Observations on the Initial Report of South Africa* (2018) UN Doc E/C.12/ZAF/CO/1 para 16.

⁸⁴⁸ Para 16 and 17(c).

⁸⁴⁹ Para 17(a).

⁸⁵⁰ 33.

⁸⁵¹ Carmona *Report of the Special Rapporteur on Extreme Poverty and Human Rights* para 60.

⁸⁵² Para 60.

⁸⁵³ Para 60.

⁸⁵⁴ See chapter three part 3 4 5 above for a discussion on the burden which women and the poor face as a result of indirect taxation. See also chapter three part 3 3 above for a discussion on anti-essentialist feminist legal theory and the benefit that an understanding of multiple identities can have on government policies.

⁸⁵⁵ De Schutter (2018) *Friederich Ebert Stiftung* 33.

⁸⁵⁶ African Commission "236 Resolution on Illicit Capital Flight from Africa" Adopted at the 53rd ordinary session (2013) ACHPR/Res.236(LIII)2013.

fight against tax evasion. Initiatives, such as establishing and funding institutions which can hold multinational organisations accountable for fraudulent tax behaviour, should be undertaken by state parties.⁸⁵⁷ The CESCR has also recommended in its concluding observations on states parties reports that state parties strengthen their measures to combat tax evasion by ensuring that private corporations are subject to necessary regulations.⁸⁵⁸ Therefore, when considering optimal strategies for the interpretation of article 26(2) of the Maputo Protocol in chapter 5, the high level of tax evasion in Africa is taken into consideration.

De Schutter also argues that international cooperation is paramount to eliminating tax evasion.⁸⁵⁹ Countries which offer an unregulated tax haven to big corporations and wealthy individuals, should be held responsible for its contribution for tax evasion.⁸⁶⁰ The CESCR has addressed this issue in particular during concluding observations on state reports. The CESCR stated the United Kingdom has allowed its overseas territories to enable financial secrecy legislation which is “affecting the ability of the state party, as well other states, to meet their obligation to mobilise the maximum available resources for the implementation of economic, social and cultural rights”.⁸⁶¹ The CESCR reiterated this point in the recent concluding observations on the state report of Switzerland.⁸⁶² The CESCR recommended that the state party take stricter measures to combat tax evasion, including by ensuring that public and private institutions are subject to appropriate regulation.⁸⁶³

As discussed above, international cooperation forms part of a state parties’ obligation to realise economic, social and cultural rights to the maximum of available resources.⁸⁶⁴ De Schutter considers three obligations created by the duty of international support and cooperation on state parties. These obligations are that the burden of foreign debt on poor countries should be alleviated, foreign aid should be

⁸⁵⁷ High-Level Panel on Illicit Financial Flows from Africa “Illicit Financial Flows” (2014) 66.

⁸⁵⁸ CESCR *Concluding Observations on the Combined Second and Third Periodic Reports of Liechtenstein* (2017) UN Doc E/C.12/LIE/CO/2-3 para 10.

⁸⁵⁹ De Schutter (2018) *Friederich Ebert Stiftung* 34.

⁸⁶⁰ 34.

⁸⁶¹ CESCR *Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland* (2016) UN Doc E/C.12/GBR/CO/6 paras 16-17.

⁸⁶² CESCR *Concluding Observations on the fourth periodic report of Switzerland* (2019) UN Doc E/C.12/CHE/CO/4.

⁸⁶³ Para 13.

⁸⁶⁴ See part 4 3 1 5 above.

provided in ways which support debt relief efforts, and loans may need to be granted to state parties under conditions which facilitate, and not impede debt relief.⁸⁶⁵

By alleviating the burden of foreign debt on poorer countries, those countries can focus their resources on the realisation of economic, social and cultural rights, instead of redirecting budgets to reimburse the debt.⁸⁶⁶ De Schutter thus argues that the focus of international assistance should be to ensure that foreign debt is alleviated and not aggravated.⁸⁶⁷ However, the main issue that is apparent in international aid is that a state party to the ICESCR cannot be held responsible for not providing foreign aid. De Schutter reiterates this by stating that it is politically difficult to justify that a state party should have done more to support the realisation of economic, social and cultural rights in another state by increasing aid.⁸⁶⁸ This is also since the liability for taking certain actions is easier to justify than the liability for an omission.⁸⁶⁹ The benchmark which the CESCR utilise when assessing state parties' international assistance in state reports is 0,7% ODA/GNI.⁸⁷⁰ This target requires that state parties commit to contribute international aid, or official development assistance ("ODA"), by a margin of 0,7% of their gross national income ("GNI").

Seeking loans from international institutions and other state parties to realise economic, social and cultural rights is considered a "double-edged sword".⁸⁷¹ This is because foreign loans can assist in stimulating the economy and funding local effort to realise economic, social and cultural rights. However, this can also lead to high levels of debt and creditors imposing conditions on how macroeconomic policies have to be carried out.⁸⁷²

In this regard, De Schutter refers to Greece, which had received three separate financial rescue packages in 2010, 2012 and 2015.⁸⁷³ The European Commission, the International Monetary Fund, and the European Central Bank (as the creditors) imposed amendments to Greece's labour legislation in an attempt to provide

⁸⁶⁵ De Schutter (2018) *Friederich Ebert Stiftung* 9.

⁸⁶⁶ 40.

⁸⁶⁷ 42.

⁸⁶⁸ 44.

⁸⁶⁹ 44.

⁸⁷⁰ The 0,7% ODA/GNI benchmark was first agreed upon and introduced in 1970 as a means for developed countries to assist developing countries achieve desirable growth rates. The Development Assistance Committee of the Organisation for Economic Cooperation and Development introduced the benchmark. See further <<https://www.oecd.org/dac/stats/the07odagnitarget-ahistory.htm>>.

⁸⁷¹ De Schutter (2018) *Friederich Ebert Stiftung* 44.

⁸⁷² 45.

⁸⁷³ 45.

“flexibility” to the economy.⁸⁷⁴ However, this violated various provisions of the European Social Charter, as some of the amendments included that labour contracts could be terminated without notice or severance pay.⁸⁷⁵ The CESCR stated that Greece needed to ensure that all policies and programmes which are enabled as a result of international relief, are reviewed to assess their impact on the most marginalised groups.⁸⁷⁶ With regard to further international aid, the CESCR reiterated that the ICESCR should always be taken into account when negotiating foreign loans.⁸⁷⁷ In 2016, the CESCR echoed this requirement by stating that, “the state party seeking financial assistance should be aware that any conditions attached to a loan that would imply an obligation on that state to adopt retrogressive measures in the area of economic, social and cultural rights that are unjustifiable would be in violation of the Covenant”.⁸⁷⁸

State parties to the ICESCR will only be able to allocate maximum available resources, in terms of article 2(1) of the ICESCR, to the realisation of economic, social and cultural rights, if they are able to effectively generate these resources in a way that abides by human rights principles. Thus, all state parties need to reconsider their taxation systems and international agreements. Such policies could have an extensive application to the Maputo Protocol because the policies need to consider the effect that generating resources has on marginalised groups of people, which include diverse women.

4.3.2.2 *Spending resources to realise economic, social and cultural rights*

De Schutter argues that spending priorities is the area where state parties to the ICESCR need the most guidance.⁸⁷⁹ As discussed in chapter 3, gender responsive budgeting has become a popular choice for state parties to meet their obligations in terms of the Maputo Protocol. However, many gender responsive budgeting initiatives

⁸⁷⁴ *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece* ECSR, Decision on the merits (23 May 2012) Complaint No 65/2011; *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece* ECSR, Decision on the merits, 23 May 2012, Complaint No 66/2011.

⁸⁷⁵ Complaint No 65/2011 para 21.

⁸⁷⁶ CESCR *Concluding Observations: Greece* UN Doc. E/C.12/GRC/CO/2 (2015) para 7.

⁸⁷⁷ Para 8.

⁸⁷⁸ *Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights* para 4.

⁸⁷⁹ De Schutter (2018) *Friederich Ebert Stiftung* 47.

lack elements of anti-essentialism which ensure that the initiatives respond to the needs of diverse women.⁸⁸⁰ Thus, the need arises to assess how spending strategies are assessed under different international human rights treaties.

Article 2(1) of the ICESCR does not make any reference to the outcomes which state parties need to achieve to have fulfilled their obligations, instead, the provision requires state parties to allocate a sufficient share of their resources to the constant improvement and full realisation of economic, social and cultural rights.⁸⁸¹ Thus, there needs to be clear guidance as to how these resources need to be spent. One way to guide resource allocation is the “human expenditure ratio” which represents the share of total GDP that goes towards human priority concerns.⁸⁸² The United Nations Development Programme (“UNDP”) estimates that the human expenditure ratio needs to be around 5% of GDP should a country wish to progress human development.⁸⁸³ De Schutter argues that this index cannot be applied absolutely to every country, as it does not take into account the current development of the country or which sectors relevant to various economic, social and cultural rights the country needs to focus on.⁸⁸⁴ The CESCR is also reluctant to recommend an exact percentage which a state party should allocate to social spending. The CESCR expressed concern in the recent concluding observations on the state reports of Kazakhstan and Estonia over their overall low level of public expenditure on social services as a ratio of their GDP and recommended to both state parties that this level be increased.⁸⁸⁵ The CESCR has also recommended that state parties increase their social spending as a percentage of GDP where there has been a long-term increase in GDP.⁸⁸⁶

The main problem that also arises out of the human expenditure ratio is that state parties can argue that they simply cannot allocate more resources to human development programmes. It then becomes difficult to assess whether a state party has done enough in terms of allocating resources to realise economic, social and

⁸⁸⁰ See chapter three part 3 4 5 above for a discussion on different gender responsive budgeting initiatives.

⁸⁸¹ De Schutter (2018) *Friederich Ebert Stiftung* 49.

⁸⁸² 48.

⁸⁸³ United Nations Development Programme *Human Development Report 1991: Financing Human Development* (1991) 39.

⁸⁸⁴ De Schutter (2018) *Friederich Ebert Stiftung* 51.

⁸⁸⁵ CESCR *Concluding Observations on the Second Periodic Report of Kazakhstan* (2019) UN Doc E/C.12/KAZ/CO/2 paras 19-20; CESCR *Concluding Observations on the Third Periodic Report of Estonia* (2019) UN Doc E/C.12/EST/CO/3 paras 8-9.

⁸⁸⁶ CESCR *Concluding Observations on the Fourth Periodic Report of the Republic of Korea* (2017) UN Doc E/C.12/KOR/CO/4 para 11.

cultural rights, even though it appears their efforts were insufficient to meet their obligations in terms of the ICESCR.⁸⁸⁷ Therefore, De Schutter refers to the human expenditure ratio as being useful for setting a target which state parties can reach, but not in assessing whether state parties can do more.⁸⁸⁸

According to the introduction of the document, the Maastricht Guidelines were designed to elaborate on the Limburg Principles, with specific reference to the violations of economic, social and cultural rights.⁸⁸⁹ Guideline 13 states that “in determining which actions or omissions amount to a violation of an economic, social and cultural right, it is important to distinguish the inability from the unwillingness of a state to comply with its treaty obligations”. However, this could also prove difficult as a low GDP does not necessarily result in an inability to fulfil rights.⁸⁹⁰ The burden of proof remains on the state party to show that there was an ability to realise the rights in the ICESCR.⁸⁹¹

In order to solve the dilemma of assessing whether there really was an inability of the state party to realise economic, social, and cultural rights, De Schutter suggests a causality analysis.⁸⁹² A causality analysis determines whether state parties reached their desired outcomes, and if not, whether the disparity in outcomes could be attributed to their inability to execute appropriate policies. This analysis is derived from the work of Felner. He identifies five benchmarks against which human rights indicators can be measured, as well as a three-step approach by which to conduct the causality analysis.⁸⁹³

One of the benchmarks consists of a commitment made by the state party.⁸⁹⁴ This includes legal commitments through the enactment of legislation or ratification of international treaties. It also includes a publicly-made commitment by the government of the state, such as a commitment to increase public housing by 20% in two years.⁸⁹⁵ Another benchmark is the use of past outcome indicators.⁸⁹⁶ This requires a

⁸⁸⁷ De Schutter (2018) *Friederich Ebert Stiftung* 51.

⁸⁸⁸ 51.

⁸⁸⁹ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) *IPASA*.

⁸⁹⁰ De Schutter (2018) *Friederich Ebert Stiftung* 54.

⁸⁹¹ V Dankwa, C Flinterman & S Leckie “Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights” (1998) 20 *Human Rights Quarterly* 705 719.

⁸⁹² De Schutter (2018) *Friederich Ebert Stiftung* 54.

⁸⁹³ E Felner “A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability” (2008) 9 *International Journal on Human Rights* 109 115.

⁸⁹⁴ 115.

⁸⁹⁵ 115.

⁸⁹⁶ 115.

comparison to assess whether the state party has made any progress with the level of enjoyment of economic, social and cultural rights. De Schutter has grouped these first two benchmarks as internal reference points.⁸⁹⁷ The advantage of these two benchmarks, as argued by De Schutter, is that they were set by the state party concerned and can thus not be questioned on grounds of legitimacy. However, it is also necessary to scrutinise the targets which the state party has set to ensure that it is not flawed and undermining to human rights objectives.⁸⁹⁸

The following two benchmarks utilise an international perspective as the reference point. The third benchmark includes using established international human rights standards, such as a benchmark of 100 per cent primary education completion rate.⁸⁹⁹ The fourth benchmark requires countries with similar levels of development to be the focus of comparison.⁹⁰⁰ It can reveal whether the progress made a country to realise economic, social and cultural rights is lower than expected for that country's level of development. The fifth benchmark incorporates the thinking of anti-essentialist feminist legal theory. Disaggregated national data (such as gender, poverty levels and race) is used to compare the enjoyment of economic, social and cultural rights among different population groups.⁹⁰¹ By analysing the disaggregated national data, it becomes clear where state parties have fallen short in ensuring the rights in the ICESCR are being enjoyed equally and measures are being implemented to strive to substantive equality.

De Schutter argues that a combination of these benchmarks should be used when evaluating the enjoyment of economic, social and cultural rights in different countries.⁹⁰² However, De Schutter continues that the approach where international perspectives are used could prove more promising. By assessing countries in similar sub-regions, with similar levels of development, it ensures that state parties are being compared more fairly and independently, than if they were only compared to their own internal benchmarks.⁹⁰³ An approach such as this is more manageable for regional supervisory bodies when they assess the level of development and human rights

⁸⁹⁷ De Schutter (2018) *Friederich Ebert Stiftung* 55.

⁸⁹⁸ Felner *International Journal on Human Rights* 116.

⁸⁹⁹ 115.

⁹⁰⁰ 115.

⁹⁰¹ 116.

⁹⁰² De Schutter (2018) *Friederich Ebert Stiftung* 55.

⁹⁰³ 55.

protection in the region. Bodies such as the African Commission can make more accurate assessments when comparing the development of countries in the same sub-region. Such a sub-regional based benchmark could assist when developing gender responsive budgeting strategies for African countries. Most African countries already form part of sub-regional groups, thus sub-regional benchmarks could be set and evaluated by the African Commission.⁹⁰⁴

These five benchmarks can be utilised in the three-step approach when conducting a causality analysis, as developed by Felner. The first step is identifying deprivations and disparities in the enjoyment of economic, social and cultural rights.⁹⁰⁵ This step includes using outcome indicators, such as primary education completion rates, maternal mortality rates or child malnutrition rates, to identify whether there are major disparities in the enjoyment of the rights in the ICESCR. Key areas are measuring: the minimum levels of enjoyment of economic, social and cultural rights; the progressive realisation over time; and the inequality of rights enjoyment between different population groups.⁹⁰⁶ The international comparisons benchmarks are useful to ascertain what has been achieved in other countries with similar resources, while the benchmarks set by internal indicators by the state party are valuable in assessing the progressive realisation of certain rights over time.⁹⁰⁷

Step two necessitates the identification of the main determinant of the deprivations and inequalities as identified in step one.⁹⁰⁸ While the first step assesses the realisation of rights from the viewpoint of the right holder, the second step considers the viewpoint of the state party and the policies which they have in place to realise economic, social and cultural rights. Step three is the most essential step in the causality analysis.⁹⁰⁹ This step assesses the adequacy of policy efforts to address the determinants as identified in step two.⁹¹⁰ Thus, the actions and omissions of state parties are being scrutinised to determine if they created or perpetuated the levels of

⁹⁰⁴ This also proves beneficial if more state parties to the Maputo Protocol adopt gender responsive budgeting, as discussed in chapter three part 3 4 5 above. The African Commission would be able to assess the outcomes and benchmarks as set by countries in the same sub-region, with similar development levels, in order to provide more comprehensive feedback in communications and concluding observations. This will be further discussed in chapter 5.

⁹⁰⁵ Felner *International Journal on Human Rights* 116.

⁹⁰⁶ 117.

⁹⁰⁷ 116.

⁹⁰⁸ 118.

⁹⁰⁹ 122.

⁹¹⁰ 122.

deprivations in the enjoyment of economic, social and cultural rights. De Schutter argues that these three steps make it possible to identify whether the deprivations of economic, social and cultural rights are attributable to a failure by the state party to comply with its obligations, or instead the result of a lack of capacity.⁹¹¹

In 2012, the CESR built on the three-step approach as developed by Felner. The CESR developed a four-step framework called OPERA, which stands for “outcomes, policy efforts, resources and assessment”.⁹¹² The “outcomes” step requires that the level of enjoyment of rights are assessed.⁹¹³ During this step, a measurement of the minimum core obligations, non-discrimination and progressive realisation needs to be done.⁹¹⁴ Identifying outcome indicators that show the extent of how the minimum essential levels of rights are enjoyed in the country, assist in determining whether state parties have met their minimum core obligations.⁹¹⁵ Disaggregate indicators by different populations groups show if there are disparities in the enjoyment of economic, social and cultural rights, which could result in discrimination.⁹¹⁶ The disaggregate indicators are also essential in assuring that the outcomes being assessed are held to the values of anti-essentialist feminist legal theory.⁹¹⁷ Assessing indicators over time, as well as goals set by the state party, determine if the rights in the ICESCR are being realised progressively.⁹¹⁸

The “policy efforts” step aims to assess the state parties’ commitment and efforts to fulfil economic, social and cultural rights.⁹¹⁹ During this step, an assessment of whether the state party fulfilled their obligation to take steps towards the full realisation of economic, social and cultural rights is essential.⁹²⁰ The policy effort’s steps also aim to assess the extent to which state parties have applied the PANTHER principles.⁹²¹ The PANTHER principles are also an essential component of a successful gender

⁹¹¹ De Schutter (2018) *Friederich Ebert Stiftung* 55.

⁹¹² Center for Economic and Social Rights (New York) *The OPERA Framework: Assessing Compliance with the Obligation to Fulfil Economic, Social and Cultural Rights* (2012).

⁹¹³ 15.

⁹¹⁴ See parts 4 3 1 4, 4 3 1 6, and 4 3 1 2 above for a discussion on minimum core obligation, non-discrimination and progressive realisation respectively.

⁹¹⁵ Center for Economic and Social Rights *The OPERA Framework* 15.

⁹¹⁶ 15.

⁹¹⁷ See chapter three part 3 3 2 above for a discussion on anti-essentialist feminist legal theory.

⁹¹⁸ Center for Economic and Social Rights *The OPERA Framework* 15.

⁹¹⁹ 17.

⁹²⁰ See part 4 3 1 2 above for a discussion on the obligation to take steps.

⁹²¹ See chapter three part 3 4 4 above for a discussion on the PANTHER principles and their relevance to gender responsive budgeting.

responsive budgeting initiative. In particular, for the OPERA framework, the principles of participation, transparency and accountability are essential to ensure that state parties have put sufficient work into their policy efforts.⁹²²

The “resources” step considers whether state parties have dedicated enough resources to the fulfilment of the rights in the ICESCR, whether they have mobilised all available resources, and how decisions regarding resources mobilised are made.⁹²³ This should be done through an analysis of minimum core obligations and how specific rights are being achieved.⁹²⁴ An analysis of non-discrimination should also be done to assess which population groups are benefitting most from resource allocation and whether substantive equality is being promoted through the generation and spending of resources. Progressive realisation should also be assessed to ensure the allocation of resources are actualising into the full realisation of economic, social and cultural rights over time.⁹²⁵ The OPERA framework also states that the PANTHER principles are paramount at the resources step and an assessment needs to be done about how the public has participated in the budgetary process and whether NGOs can hold state parties accountable to budgetary decisions.⁹²⁶ This, again, relates to the gender responsive budgeting and the significance of the participation of civil society in the budgetary process.

The “assessment” step is the final step of the OPERA framework.⁹²⁷ During this stage, the conditions which limit or prevent people from enjoying economic, social and cultural rights first need to be identified.⁹²⁸ In particular, the acts or omissions of third parties, which impact on the state parties’ ability to realise the rights in the ICESCR, need to be identified. Here, the extraterritorial obligations of the state party can be assessed to determine whether an attempt was made to request aid to ensure the fulfilment of rights.⁹²⁹ Finally, the state’s compliance with their obligations to realise rights needs to be assessed. This includes an overall examination of the previous

⁹²² Center for Economic and Social Rights *The OPERA Framework* 18.

⁹²³ 22.

⁹²⁴ See part 4 3 1 4 above for a discussion on minimum core obligations.

⁹²⁵ Center for Economic and Social Rights *The OPERA Framework* 22.

⁹²⁶ 22.

⁹²⁷ 27.

⁹²⁸ 27.

⁹²⁹ See part 4 3 1 5 above for a discussion on extraterritorial obligations.

three steps to draw a conclusion of whether the state party in question have fulfilled their obligations in terms of the ICESCR.⁹³⁰

The strategies utilised to allocate resources, which includes generating and spending resources, in terms of the ICESCR will prove paramount for developing an interpretation of article 26(2) of the Maputo Protocol. The CESCR and various scholars have extensively defined and interpreted article 2(1) of the ICESCR. State parties are aware of various strategies they can employ to progressively realise the rights in the ICESCR to the maximum available resources.

4 4 Conclusion

The analysis in this chapter established that extensive standards for interpreting resource allocation in terms of CEDAW and the ICESCR have been developed. While CEDAW does not have an operating provision relating to the allocation of resources, the CEDAW Committee has interpreted resource allocation for provisions through the general recommendations and communications. These general recommendations, as well as concluding observations on state reports, demonstrate that there are clear obligations on state parties to ensure sufficient resources have been allocated to realise the rights in CEDAW.

Gender responsive budgeting has been established as a strategy for state parties to realise their obligations in terms of CEDAW. The CEDAW Committee has discussed and applied elements of anti-essentialist feminist legal theory, but there is still room for further development in this regard. The gender responsive budgeting strategies developed under CEDAW have been applied by various state parties. Gender responsive budgeting strategies under the Maputo Protocol, as developed in chapter 5, will be enhanced by the rights-based interpretations under CEDAW, and the various measures required to realise the rights under CEDAW.⁹³¹

Furthermore, the ICESCR has an operating provision which creates clear resource obligations on state parties. The CESCR has, through general comments, communications and statements, elaborated on these obligations. A specific analysis was conducted to assess resource allocations in terms of maximum available resources, progressive realisation, retrogressive measures, minimum core and

⁹³⁰ Center for Economic and Social Rights *The OPERA Framework* 18.

⁹³¹ Parts 4 2 2 and 4 2 3 above respectively.

extraterritorial obligations.⁹³² These doctrinal elements are applied through strategies which have been developed for state parties to meet their obligations in terms of article 2(1) of the ICESCR. Particular strategies for generating resources and spending resources in terms of the ICESCR were analysed and shown to have broad application.

The following chapter demonstrates how holistic budgeting strategies, as discussed under sub-section 4 3 2, enhances the gender responsive budgeting initiatives formulated to realise the rights in the Maputo Protocol. The discussion of CEDAW and the ICESCR in this chapter forms the foundation of the analysis of budgeting for human rights in chapter 5. Therefore, the following chapter considers possible interpretations of article 26(2) of the Maputo Protocol, taking into consideration the theoretical framework set out in chapter 3 and the analysis of resource allocation under CEDAW and the ICESCR.

⁹³² Part 4 3 1 above.

CHAPTER 5: DEVELOPING AN INTERPRETATIVE FRAMEWORK FOR ARTICLE 26(2) OF THE MAPUTO PROTOCOL

5 1 Introduction

The purpose of this chapter is to develop an interpretative framework within which article 26(2) of the Maputo Protocol can be applied. This interpretative framework can inform how supervisory bodies, such as the African Court, the African Commission, and the Special Rapporteur, should interpret article 26(2) of the Maputo Protocol. It can further guide state parties in the implementation of their obligations under article 26(2).

The discussion in this chapter departs from the interpretation of article 26(2) of the Maputo Protocol, established in chapter 2. The proposed framework is developed by considering the substantive interpretation of resource allocation and gender responsive budgeting under CEDAW and the ICESCR, which was discussed in chapter 4. Moreover, anti-essentialist feminist legal theory and gender responsive budgeting, as discussed in chapter 3, guide the theoretical understanding of the interpretative framework.

5 2 Interpretation by supervisory bodies

The African Court, the African Commission and the Special Rapporteur have a significant role to play as the supervisory bodies of the Maputo Protocol. Through their diverse mandates, they can effectively interpret article 26(2) of the Maputo Protocol and guide state parties in their gender responsive budgeting initiatives.

To fulfil their mandates, these supervisory bodies, first, need to incorporate the theoretical framework of anti-essential feminist legal theory. To do so, these supervisory bodies need to ask the “women question”.⁹³³ It includes asking what impact the current legal system and policies have on women.⁹³⁴ By asking the relevant questions, the supervisory bodies will be able to evaluate how the law and state parties have failed women and how this can be rectified to ensure that women are empowered and protected.⁹³⁵ More specifically, supervisory bodies should interrogate who is being

⁹³³ See chapter three part 3 2 above.

⁹³⁴ KA Bartlett “Feminist Legal Methods” (1990) 103 *Harvard Law Review* 829 837.

⁹³⁵ 837.

affected by the legal system and how the law can best protect the women affected.⁹³⁶ By assessing who the specific women are that are being affected, supervisory bodies need to incorporate the goals of anti-essentialist feminist legal theory. Thus, the “women question” is expanded by asking which specific groups of women are being adversely impacted. Therefore, practically, the supervisory bodies must interpret article 26(2) of the Maputo Protocol by contextualising the communication or provision before them and interrogating which groups of women are most affected.

An example of this would be the African Commission inquiring which women would be affected by a specific policy or law in their decisions on communications. Only by consistently asking the “women question”, as well as considering who these specific women were, can supervisory bodies effectively interpret article 26(2) of the Maputo Protocol and achieve substantive equality. Substantive equality requires laws and policies to take into consideration women’s lived experiences and patriarchal customs that disempower women.⁹³⁷ Ultimately, the supervisory bodies will be able to assess “both the law as it is, as well as the law as it ought to be”, which is crucial in a feminist jurisprudential inquiry.⁹³⁸

Secondly, supervisory bodies need to promote the use of gender responsive budgeting as a way to effectively allocate resources for the realisation of women’s rights. When applied effectively with the needs of diverse women at the forefront, gender responsive budgeting is considered a manifestation of anti-essentialist feminist legal theory and it reflects a government’s values and priorities.⁹³⁹ As discussed in chapter 3, the main concepts of anti-essentialist feminist legal theory are not directly aligned to gender responsive budgeting. Thus, the supervisory bodies need to continually interrogate and evaluate the inclusion of the needs of diverse women within gender responsive budgeting initiatives.⁹⁴⁰ This can, for example, be done by the African Commission when assessing state reports that state parties have submitted under the Maputo Protocol. The supervisory bodies are required to evaluate that the rights and needs of diverse women are integrated into all aspects of government policy

⁹³⁶ See chapter three part 3 3 1 above.

⁹³⁷ M Sjöholm *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* (2018) 34. See chapter three part 3 3 1 above.

⁹³⁸ Bonthuyus & Albertyn *Gender, Law and Justice* 5.

⁹³⁹ Budoo *The Role of Gender Budgeting* 121; A Quinn “Equality Proofing the Budget: Lessons from the Experiences of Gender Budgeting” in A Nolan, R O’Connell & C Harvey (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (2013) 164.

⁹⁴⁰ See chapter three part 3 4 2 above.

and budgets to ensure a holistic application of gender responsive budgeting.⁹⁴¹ The following sub-sections consider the specific steps which different supervisory bodies can take, through their various mandates, to further develop the interpretative framework.

5 2 1 African Court

Article 27 of the Maputo Protocol provides that the African Court shall be seized with matters of interpretation and implementation arising from the Maputo Protocol.⁹⁴² The African Court should, therefore, apply article 26(2) of the Maputo Protocol within the context of every case with resource implications for the state party involved. The application of article 26(2) should include an evaluation of state parties' resource allocation, or lack thereof, for every right that has resource implications. Furthermore, the interpretation of article 26(2) should arguably also include guidance on how state parties should allocate or reallocate budgetary resources to effectively realise women's rights. To fulfil the objectives of the Maputo Protocol, the African Court must also adequately apply anti-essentialist feminist legal theory, which includes starting by asking the "women question" and considering who these women are to ensure that diverse women are protected and empowered.⁹⁴³ Thus, the African Court should evaluate how diverse women have been, or could be, affected by the legislation, policies or actions of the state party.⁹⁴⁴

As discussed in chapter 2, the African Court has only heard two cases based on the Maputo Protocol.⁹⁴⁵ It has furthermore not yet applied article 26(2) to any of its cases. In *APDF* the African Court could have made significant recommendations in terms of resource allocation for women's rights.⁹⁴⁶ The African Court ordered the state party to amend its legislation which was in contravention of its obligation to protect

⁹⁴¹ See chapter three part 3 4 2 above.

⁹⁴² The African Court is, however, still limited in the guidance that it can provide state parties because of the limited Court Protocol ratifications and declarations made in terms of article 36(4) of the Court Protocol. Thus, individuals and NGOs are largely obstructed by reaching the African Court for guidance in terms of resource allocations for women's rights. The African Court, along with the assistance of the African Commission and the Special Rapporteur need to encourage the ratification of the Court Protocol and article 34(6) declarations at every possible opportunity. See chapter two part 2 2 2 above for a further discussion on the Court Protocol ratifications and declarations.

⁹⁴³ See chapter two part 2 2 2 and chapter three part 3 2 above.

⁹⁴⁴ See part 5 2 above.

⁹⁴⁵ *Mariam Kouma and Another v Republic of Mali* Application No 040/2016; *APDF and IHRDA v Republic of Mali* Application No 046/2016. See chapter two part 2 2 2 above.

⁹⁴⁶ See chapter two part 2 2 2 above.

women's rights in terms of the ACHPR and the Maputo Protocol.⁹⁴⁷ The state party was also ordered to sensitise and educate its population on the amended legislation.⁹⁴⁸ Descriptions of such sensitisation and education are, arguably, also resource intensive. Thus, the African Court had an opportunity to interpret and apply article 26(2) of the Maputo Protocol.

Through this interpretation, it could have articulated that part of budgeting for women's rights must be allocated to programmes of re-socialisation and education. Such interventions were missing from resource allocation recommendations and are arguably very costly for the state.⁹⁴⁹ In this way, the African Court could have provided context as to how state parties should be using gender responsive budgeting to ensure that women's rights are not violated by harmful social practises. As discussed above, the African Court must contextualise its recommendations in terms of the needs of diverse women. In *APDF* the African Court particularly referred to the rights of the girl-child as this case considered underage marriage and harmful cultural practices.⁹⁵⁰ Resource allocation recommendations, in terms of specific provisions in the Maputo Protocol, can be found later in this chapter.⁹⁵¹

In further elaborating on the African Court's mandate, it can also, as Yeshanew argues, hold state parties accountable for a misallocation of budgetary resources as per articles 10(3) and 4(2)(i) of the Maputo Protocol.⁹⁵² Therefore, the African Court has a responsibility to assess whether a country has redirected resources away from women's rights realisation and towards military spending, in terms of article 10(3). However, as Budoo states, this will be difficult to prove and the state party will, thus, have to provide evidence that the redirected spending was in the best interests of national security.⁹⁵³

In addition, in cases of gender-based violence, the African Court must prescribe that state parties meet their obligations in terms of article 4(2)(i) read with article 26(2) of the Maputo Protocol.⁹⁵⁴ This includes, for example, recommending that state parties

⁹⁴⁷ *APDF and IHRDA v Republic of Mali* Application No 046/2016 para 130.

⁹⁴⁸ Para 131. See chapter two part 2 2 2 above.

⁹⁴⁹ See chapter two part 2 2 2 above.

⁹⁵⁰ *APDF and IHRDA v Republic of Mali* Application No 046/2016 para 130. See chapter two part 2 2 2 above.

⁹⁵¹ See part 5 3 4 below.

⁹⁵² Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 294. See chapter two part 2 2 1 above.

⁹⁵³ Budoo *The Role of Gender Budgeting* 84. See chapter two part 2 2 1 above.

⁹⁵⁴ See chapter two part 2 2 1 above.

increase police training, provide women's shelters, provide support services for survivors of sexual or domestic violence and equal access to justice for all women.⁹⁵⁵ The African Court should relate these recommendations directly to resource commitments under article 26(2). The CEDAW Committee has acknowledged that women also face gender-based violence because of intersecting forms of discrimination.⁹⁵⁶ The African Court must remain cognisant of the effect that multiple, intersecting identities have on women and the discrimination they face, particularly with regard to gender-based violence. Specific recommendations to state parties to allocate resources to eradicate gender-based violence is discussed later in this chapter.⁹⁵⁷

5 2 2 African Commission

5 2 2 1 *General comments and communications*

Through its various mandates, the African Commission can monitor state parties' implementation of the Maputo Protocol and interpret the various provisions of the Maputo Protocol. However, it must be noted that the African Commission does not have a strong record of supporting women's rights and enforcing the Maputo Protocol. The African Commission has only dealt with ten communications pertaining to women's rights dating back to 1996.⁹⁵⁸ As Rudman argues, the African Commission has not contributed to an environment where women's rights are prioritised, due in part to its lack of rigorous and thorough handling of women's rights issues which have appeared before it.⁹⁵⁹ Thus, there needs to be extensive reform within the African Commission itself before it can effectively act as the supervisory body for women's rights.

The African Commission, along with the Special Rapporteur, have significant roles to play in supporting and protecting women's rights in Africa. Therefore, they must ensure that they prioritise women's rights and effectively hold state parties

⁹⁵⁵ M Mutiithi "An analysis of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" in B Kombo et al *Journey to equality: 10 years of the Protocol on the Rights of Women in Africa* (2013) 44 <<http://www.soawr.org/images/JourneytoEquality.pdf>> (accessed 07-07-2020).

⁹⁵⁶ CEDAW Committee, General Recommendation 35 para 12. See chapter four part 4 2 2 2 above.

⁹⁵⁷ See part 5 3 4 2 below.

⁹⁵⁸ Budoo *The Role of Gender Budgeting* 331.

⁹⁵⁹ 332.

accountable for their obligations in the Maputo Protocol. This includes making progressive decisions on communications as well as directly referring to gender responsive budgeting and the needs of diverse women in their general comments.

The African Commission can furthermore provide interpretative guidance to state parties regarding the implementation of the Maputo Protocol through their general comments and communications. However, it has not yet released a general comment directly addressing and interpreting article 26(2) of the Maputo Protocol. Such a general comment would prove beneficial to guide state parties regarding the nature of gender responsive budgets. In contrast, the CESCR has released a general comment addressing article 2(1) of the ICESCR and what the obligations of state parties are with regard to mobilising resources.⁹⁶⁰ The benefit of this general comment was that the CESCR was able to confirm that there are some rights within the ICESCR which cannot be realised over a short time, but which would, instead, require the commitment of state parties to progressively realise these rights over a longer period of time.⁹⁶¹ Subsequently, these rights would require resources which are allocated accordingly over a longer period of time. The African Commission should make similar recommendations to state parties within a general comment, as discussed in further detail later in this chapter.⁹⁶²

Within a general comment specifically addressing article 26(2) of the Maputo Protocol, the African Commission should recommend that state parties adopt gender responsive budgets in order to meet their obligations in terms of the Maputo Protocol. Such gender responsive budgets should respond to the needs of diverse women within that country. Particularly, the African Commission should recommend that state parties, as part of their gender responsive budgeting initiatives, re-evaluate their legislation and policies to ascertain how they affect women, as well as which groups of women are being most adversely affected. By doing this, state parties would be advised to engage with the needs of diverse women, as well as the “women question”, and concern themselves with the law as it ought to be.⁹⁶³ The African Commission should make use of the implementation strategy for gender responsive budgets as laid

⁹⁶⁰ CESCR General Comment 3 *The nature of states parties' obligations* (1990) UN Doc E/1991/23. See chapter four part 4 3 1 1 above.

⁹⁶¹ CESCR General Comment 3 para 9. See chapter four part 4 3 1 2 above.

⁹⁶² See part 5 3 3 below.

⁹⁶³ See chapter three part 3 2 and chapter five part 5 2 above.

out later in this chapter.⁹⁶⁴ It should also ensure that part of their interpretation for resource allocation in such general comments include the specific needs that diverse and marginalised groups of women have. Thus, the African Commission should always contextualise the needs of diverse women and ensure that the most marginalised groups of women are protected and empowered through resource allocation.

The African Commission is also able to address resource allocation for women's rights through general comments on other provisions in the Maputo Protocol. The African Commission should, thus, make direct reference to article 26(2) in all general comments on provisions in the Maputo Protocol which require extensive resources from state parties. In this way, the African Commission can provide an interpretation of the specific resources that different rights in the Maputo Protocol require. This was briefly alluded to in General Comment 2 where the African Commission stated that adequate finances were needed to strengthen public health services.⁹⁶⁵ Through these various general comments, the African Commission could reiterate the significance of article 26(2) and how the rights in the Maputo Protocol can rarely be realised without extensive budgetary investments. In comparison, the CEDAW Committee has done this through its general recommendations on various resource-intensive provisions in CEDAW.⁹⁶⁶ For example, the CEDAW Committee reiterated that resource intensive measures, such as the establishment of task teams and the development of policies, are required to prohibit discrimination against women.⁹⁶⁷ The specific resources and measures which certain provisions in the Maputo Protocol require are addressed later in this chapter.⁹⁶⁸

The African Commission should, furthermore, make specific mention of the need for state parties to establish gender responsive budgets in its general comments. The African Commission, moreover, has a responsibility to address the needs of marginalised and diverse groups of women who would require specific protection from state parties. This should involve interpreting the impact article 26(2) of the Maputo

⁹⁶⁴ See part 5 3 below.

⁹⁶⁵ General Comment 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, African Commission on Human and Peoples' Rights (2014) Adopted at the 55th Ordinary Session para 62. See chapter two part 2 2 3 above.

⁹⁶⁶ See chapter four part 4 2 2 above.

⁹⁶⁷ CEDAW Committee, General Recommendation 28 para 27. See chapter four part 4 2 2 1 above.

⁹⁶⁸ See part 5 3 4 below.

Protocol and budgeting for women's rights has on diverse women. For example, the African Commission should release a general comment on non-monetised care work and how state parties should account for this care economy in their gender responsive budgets.⁹⁶⁹ A significant part of this general comment should include budgeting for the needs of poorer women in rural communities who form the majority of non-monetised care workers. As discussed above, the African Commission should always include an analysis of which groups of women would require the most protection within their general comments.⁹⁷⁰ In this way, their interpretative work would include the theoretical framework of anti-essentialist feminist legal theory.

Article 26(2) of the Maputo Protocol has not yet been discussed or applied in any decisions or communications by the African Commission. The African Commission has only finalised one communication dealing with women's rights, and the Maputo Protocol was not mentioned since the state party had not ratified the treaty.⁹⁷¹ Nevertheless, the African Commission has shown that it can make progressive recommendations as established in the *SERAC* and *Purohit* communications.⁹⁷² The African Commission stated in *SERAC* that there is no right in the ACHPR that cannot be made effective, despite apparent resource constraints.⁹⁷³ In *Purohit*, the African Commission instructed that state parties should take concrete, immediate steps towards the realisation of the rights in the ACHPR.⁹⁷⁴

When assessing future communications on women's rights and the Maputo Protocol, the African Commission should make similar progressive recommendations. Most recommendations made by the African Commission are resource intensive. Thus, article 26(2) should be directly applied in decisions on communications, relating to the Maputo Protocol, as it establishes the significance of the provision and ensures that state parties give resource allocation the necessary attention. The African Commission could, for example, show that article 26(2) of the Maputo Protocol should be applied when state parties need to amend legislation, establish task teams, provide victims with compensation and ensure that there are adequate avenues for seeking justice for women.

⁹⁶⁹ See part 5 3 4 5 below.

⁹⁷⁰ See part 5 2 above.

⁹⁷¹ Communication 323/06: *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt* (2011). See part 2 2 3 above.

⁹⁷² Communication 155/96 (2001); Communication 241/01 (2003). See chapter two part 2 3 1 above.

⁹⁷³ Communication 155/96 (2001) para 68. See chapter two part 2 3 1 above.

⁹⁷⁴ Communication 241/01 (2003) para 84. See chapter two part 2 3 1 above.

The African Commission is also able to individually assess which groups of women are most affected in a situation addressed in specific communication. The CEDAW Committee used this approach in the *Pimentel* communication where the specific health care needs of poorer women in rural areas were addressed and contextualised.⁹⁷⁵ Similarly, the CESCER took a progressive stance in the *Calero* communication where it stated that the unique circumstances of women partaking in non-monetised care work need to be taken into consideration when allocating resources towards the non-monetised care economy.⁹⁷⁶ Thus, in line with the approaches of the CEDAW Committee and the CESCER, the African Commission should always aim to contextualise the needs of diverse women within their decisions on communications. This entails engaging with the “women question” and considering who these women are to ensure that all women are protected and empowered.⁹⁷⁷

5 2 2 2 *State reporting guidelines*

As discussed in chapter 2, state parties to the Maputo Protocol are requested to provide information on gender responsive budgeting in their state reports.⁹⁷⁸ Thus, if the state parties report on their gender responsive budgeting efforts, the African Commission can provide effective comments and evaluation on these efforts. However, as established above, state parties rarely report on their budget allocations for the realisation of the rights in the Maputo Protocol.⁹⁷⁹ The reporting guidelines are, thus, not strictly followed by state parties. This results in the provision of vague information and disparities between state reports to the African Commission. The African Commission is, therefore, not able to provide adequate supervision over the implementation of the Maputo Protocol regarding gender responsive budgeting and resource allocation.

Where state parties do mention their gender responsive budgeting efforts, the African Commission does not comment on it in the concluding observations on state reports.⁹⁸⁰ This is apparent in the concluding observations on the state report of South

⁹⁷⁵ See chapter four part 4 2 2 4 above.

⁹⁷⁶ See chapter four part 4 3 1 6 above.

⁹⁷⁷ See part 5 2 above.

⁹⁷⁸ UP “Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” (2010) UP 2. See chapter two part 2 2 4 1 above.

⁹⁷⁹ See chapter two part 2 2 4 above.

⁹⁸⁰ Such as the Republic of Rwanda and Republic of South Africa state reports and concluding observations. See chapter two part 2 2 4 2 above.

Africa where the African Commission had an opportunity to question the state party on their lack of implementation strategies in respect of their gender responsive budgeting.⁹⁸¹ The African Commission has an opportunity to guide state parties, through the concluding observations, to develop effective gender budgeting policies and strategies. The African Commission can also follow up on the implementation of the strategies which are mentioned in state reports, through the concluding observations. This is particularly important in situations where state parties refer to some form of gender responsive budgeting but no specific implementation plan has been referenced.⁹⁸² The African Commission can also request clarification on gender responsive budgeting implementation strategies or goals in terms of rule 75(3) of the Rules of Procedure.⁹⁸³

However, the African Commission should preferably request specific information from state parties regarding article 26(2) of the Maputo Protocol. State parties are already expected to report on gender responsive budgeting in terms of the state reporting guidelines, thus, it is feasible for the African Commission to require state parties to report on how their gender responsive budgeting strategies directly relates to the realisation of article 26(2) of the Maputo Protocol.⁹⁸⁴ Therefore, the African Commission should supplement the state reporting guidelines with questions pertaining to the application and realisation of article 26(2) of the Maputo Protocol. In this way, the African Commission would be able to ascertain which state parties have not adequately understood their obligation to implement gender responsive budgeting.

In addition, the involvement of civil society and NGOs in the drafting and preparation of state reports submitted to the African Commission needs to become more prominent. In terms of the reporting guidelines, state parties are recommended to involve civil society in the process of preparing state reports.⁹⁸⁵ If civil society and NGOs focused on gender issues are involved in the state reporting process, this encourages greater accountability on behalf of state parties. Civil society and NGOs

⁹⁸¹ See chapter two part 2 2 4 2 above.

⁹⁸² This can be seen in The Republic of South Africa's state report. See chapter two part 2 2 4 2 2 above.

⁹⁸³ AU "Rules of Procedure of the African Commission on Human and Peoples' Rights" (2010) *AU* <http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf> (accessed 07-07-2020). See chapter two part 2 2 4 above.

⁹⁸⁴ UP "Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2010) *UP* 1. See chapter two part 3 4 4 above.

⁹⁸⁵ UP "Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2010) *UP* 1. See chapter two part 3 4 4 above.

have a broader understanding of what state parties are planning and implementing to realise women's rights in terms of the Maputo Protocol. Thus, they are more involved in the implementation and monitoring of gender responsive budgeting initiatives.

Despite the involvement of civil society in the state reporting process being recommended, state parties have not yet directly mentioned their involvement.⁹⁸⁶ The African Commission needs to reiterate this recommendation in its concluding observations. Where state parties have not mentioned the involvement of civil society or NGOs, the African Commission should request specific institutions to submit information regarding particular areas of the state report.⁹⁸⁷ NGOs or civil society should also submit shadow reports to the African Commission which can be read alongside the state party's report.⁹⁸⁸ These shadow reports can illuminate areas of concern to the African Commission as well as illustrate the role that civil society and NGOs played in the budgetary and state reporting processes. Such shadow reports would assist the African Commission in fulfilling their supervisory role, as well as ensuring that the concluding observations provided are thorough. The state party should, through comprehensive concluding observations on state reports, be in a better position to understand what their obligations are in terms of the Maputo Protocol and what the African Commission expects of them.

In terms of the state reporting guidelines, state parties are obligated to report in two parts: Part A on the ACHPR and part B on the Maputo Protocol.⁹⁸⁹ However, as discussed above, many state parties still conflate these two parts into one report which is submitted to the African Commission.⁹⁹⁰ When the reports are conflated, state parties cannot rigorously discuss their gender responsive budgeting strategies and implementation goals to the African Commission. This is because most of the report is focused on the realisation of the rights in the ACHPR. Conflated reports also make it more difficult for the African Commission to provide effective feedback in concluding observations. State parties should, therefore, abide by the guidelines to ensure adequate engagement with the Maputo Protocol in part B of the report. The African

⁹⁸⁶ See chapter two part 2 2 4 2 above.

⁹⁸⁷ In terms of Rule 74(3) of the Rules of Procedure. See chapter two part 2 4 4 above.

⁹⁸⁸ In terms of Rule 74(2) of the Rules of Procedure. See chapter two 2 4 4 above.

⁹⁸⁹ UP "Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2010) UP. See chapter two part 2 2 4 1 above.

⁹⁹⁰ See chapter two part 2 2 4 1 above.

Commission should moreover address non-compliance with reporting guidelines in their concluding observations on state reports.

The analysis in chapter 4 on CEDAW can also assist state parties in their state reporting in terms of the Maputo Protocol. Under the Compilation Reporting Guidelines, state parties to CEDAW need to address how the rights in CEDAW are being implemented for different groups of women, particularly those that face multiple forms of discrimination.⁹⁹¹ Therefore, state parties need to be cognisant of the multiplicity of women's identities in their state reports, which is at the core of anti-essentialist feminist legal theory. State parties to the Maputo Protocol should incorporate this requirement into their state reports. Thus, state parties should include the implementation strategies for gender responsive budgeting which is sensitive to women who face intersecting discrimination in their state reports. This should, in theory, enable the African Commission to effectively monitor the strategies utilised to ensure all women are protected under the Maputo Protocol.

5 2 3 Special Rapporteur

The Special Rapporteur often holds side sessions at the ordinary sessions of the African Commission.⁹⁹² These side sessions have, in the past, been utilised to address the guidelines for state reporting in terms of the Maputo Protocol.⁹⁹³ However, there is an opportunity for these sessions to be further utilised to highlight the significance of reporting on gender responsive budgeting initiatives. The mandate of the Special Rapporteur includes establishing guidelines which state parties can utilise when reporting to the African Commission.⁹⁹⁴ These guidelines can assist state parties to better understand their obligations under the Maputo Protocol as well as how to address them in their periodic reports. These side sessions could become a regular instalment to make state parties aware of best practices as well as keeping them accountable in terms of their reporting obligations under the Maputo Protocol.

⁹⁹¹ Compilation Reporting Guidelines 69.

⁹⁹² See chapter two part 2 2 5 above.

⁹⁹³ See chapter two part 2 2 5 above.

⁹⁹⁴ Newsletter of the Special Rapporteur on the Rights of Women in Africa on the Occasion of the 30th Anniversary of the African Commission on Human and Peoples' Rights 6.

In order to promote the ratification and enforcement of the Maputo Protocol, the Special Rapporteur furthermore undertakes advocacy campaigns in African states.⁹⁹⁵ These types of missions and conferences can be instrumental in promoting the mandate of the Special Rapporteur and in sharing best practices of resource allocation for women's rights across state parties. These missions could also be used to collect data and best practices of state parties allocating resources for different groups of women. This could assist African countries that have been struggling to apply elements of anti-essentialist feminist legal theory to their gender responsive budgeting initiatives. The Special Rapporteur could also conduct promotional missions to countries with the sole purpose of emphasising the importance of gender responsive budgeting to realise state parties' obligation in terms of article 26(2) of the Maputo Protocol.

The Special Rapporteur may also undertake comparative studies on the situation of women's rights across the African continent.⁹⁹⁶ Such studies could compare and analyse the use of gender responsive budgeting to realise women's rights in various African countries. During the analysis of state parties' abilities or inabilities to realise the rights in the ICESCR, one benchmark of rights realisation was identified as a comparison of countries with similar development levels.⁹⁹⁷ This research argues that supervisory bodies such as the African Commission and Special Rapporteur could conduct such comparisons to make more accurate assessments of the effectiveness of gender responsive budgeting strategies of countries in the same region.⁹⁹⁸ The Special Rapporteur could conduct these studies to encourage state parties to adopt or improve their gender responsive strategies to ensure the protection and empowerment of women. These comparative studies could also assess how different countries in a similar region ensure different groups of women are involved and protected within their budgetary process. Thus, the aims of anti-essentialist feminist legal theory can also guide comparative studies.

⁹⁹⁵ Newsletter of the Special Rapporteur on the Rights of Women in Africa on the Occasion of the 30th Anniversary of the African Commission on Human and Peoples' Rights 6. See chapter two part 2 2 5 above.

⁹⁹⁶ See chapter two part 2 2 5 above.

⁹⁹⁷ Felner (2008) *International Journal on Human Rights* 115. See chapter four part 4 3 2 2 above.

⁹⁹⁸ See chapter four part 4 3 2 2 above.

During the intersession reports presented to the African Commission, the Special Rapporteur has not, yet, made any reference to article 26(2) of the Maputo Protocol.⁹⁹⁹ However, there has been reference made to budgetary allocations for women's rights in general.¹⁰⁰⁰ These platforms could be better utilised to draw attention to the significance of gender responsive budgeting for state parties to realise their obligation in terms of article 26(2) of the Maputo Protocol. The Special Rapporteur could also share best practices of budgeting for different groups of women in intersession reports. Budoo recommends that the Special Rapporteur undertake a specific study on the adoption of gender responsive budgeting as a means for state parties to realise their obligation in terms of article 26(2) of the Maputo Protocol.¹⁰⁰¹ Such a study would be enhanced by considering how different groups of women, who encounter varying degrees and types of discrimination are affected by gender responsive budgeting and how gender responsive budgeting can best be utilised to protect them.¹⁰⁰² The following section considers the potential of gender responsive budgeting as part of state parties' national policies. This section will also provide an interpretative framework for gender responsive budgeting which supervisory bodies can refer to in their various mandates.

5 3 Gender responsive budgeting

5 3 1 The involvement of NGOs and civil society in the budgetary process

The involvement of NGOs and civil society during the drafting, legislating, implementing and auditing stages of national budgets ensure that state parties adhere to article 26(2) of the Maputo Protocol.¹⁰⁰³ Thus, the active participation of NGOs and

⁹⁹⁹ See chapter two part 2 2 5 above.

¹⁰⁰⁰ Intersession Report of the Special Rapporteur on the Rights of Women in Africa presented during the 59th Ordinary Session of the African Commission (2016) <<https://www.achpr.org/sessions/intersession?id=245>> para 12; Intersession Report of the Special Rapporteur on the Rights of Women in Africa presented during the 58th Ordinary Session of the African Commission (2016) <<https://www.achpr.org/sessions/intersession?id=244>> para 15; Intersession Report of the Special Rapporteur on the Rights of Women in Africa presented during the 57th Ordinary Session of the African Commission (2015) <<https://www.achpr.org/sessions/intersession?id=189>> para 19; Intersession Report of the Special Rapporteur on the Rights of Women in Africa presented during the 56th Ordinary Session of the African Commission (2015) <<https://www.achpr.org/sessions/intersession?id=179>> para 25.

¹⁰⁰¹ Budoo *The Role of Gender Budgeting* 222.

¹⁰⁰² As discussed in parts 5 2 1 and 5 2 2 above.

¹⁰⁰³ Krafchik "Can Civil Society Add Value to Budget Decision-Making?" in United Nations Development Fund for Women 75.

civil society is a crucial part of the budgetary process.¹⁰⁰⁴ The involvement of and engagement with these groups adhere to the PANTHER principles.¹⁰⁰⁵ NGOs and civil society involved should include organisations that represent the interests of diverse women. By including such organisations, state parties will be better positioned to ensure that their budgets and policies are responsive to the needs of women with multiple identities.

When state parties incorporate an understanding of anti-essentialist feminist legal theory into every stage of their budgetary processes, it results in practices which are sensitive to all groups of women and involve women at every stage. In particular, Budlender and Hewitt suggest the active involvement of NGOs focused on education for girls, violence against women, and sexual and reproductive rights.¹⁰⁰⁶ These organisations and groups can have a significant impact on the budgetary process because of the research that they have done on the impact of policy and national budgetary decisions on different groups of women.

Due to the closed nature of some countries' budgetary processes, it is common for civil society to only be able to analyse national budgets once they have been published.¹⁰⁰⁷ While this is not the situation in all countries, if all state parties to the Maputo Protocol involve NGOs and civil society at every stage of the budgetary process, then problem areas can be identified and corrected before budgets are published and implemented. As argued above,¹⁰⁰⁸ state parties should use temporary special measures under CEDAW to provide opportunities and ensure the participation of women in the budgetary process.¹⁰⁰⁹ In terms of CEDAW, temporary special measures are utilised to accelerate substantive equality between men and women and the redistribution of power and resources.¹⁰¹⁰ When the objectives of substantive equality have been reached, these temporary special measures have to cease. Thus, a clear timeframe is imperative when implementing temporary special measures.¹⁰¹¹

¹⁰⁰⁴ See chapter three part 3 4 4.

¹⁰⁰⁵ Ekwall & Rosales "A Human Right Obligations and Responsibilities PANTHER" (2009) 5 *Food and Agriculture Organization of the United Nations*. See chapter three part 3 4 4 above for a further discussion on the PANTHER principles.

¹⁰⁰⁶ Budlender & Hewitt *Engendering Budgets* 54.

¹⁰⁰⁷ 74.

¹⁰⁰⁸ See chapter four part 4 2 3 1 above.

¹⁰⁰⁹ Elson *Budgeting for Women's Rights* 33. See chapter four part 4 2 3 1 above.

¹⁰¹⁰ CEDAW Committee, General Recommendation 25 para 39.

¹⁰¹¹ CEDAW Committee *Concluding Observations on the Eight Periodic Report of the Republic of Korea* (2018) UN Doc CEDAW/C/KOR/CO/8 para 21.

There is no specific provision in the Maputo Protocol which provides for temporary special measures. However, when considering article 26(2) of the Maputo Protocol, state parties are obligated to “adopt *all* necessary measures [emphasis added]” for the full and effective implementation of women’s rights. There are also specific provisions, such as the elimination of discrimination against women in article 2, which requires state parties to adopt appropriate legislative, institutional and other measures. Therefore, state parties must consider developing strategies for temporary special measures to be invoked to ensure the involvement of NGOs and civil society in the budgetary process. Article 9 of the Maputo Protocol (right to participation in the political and decision-making process) also provides that “state parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures... state parties shall ensure increased and effective representation and participation of women at all levels of decision-making”. The involvement of women and women’s interests NGOs in the budgetary process is included in national decision-making. Thus, the use of temporary special measures could be provided for through the affirmative action and enabling legislation which ensures the active and equal participation of women and women’s interests NGOs in the budgetary decision-making process.

Through the adoption of temporary special measures, with clear objectives and time frames, state parties can ensure that their budgetary processes are transparent and participatory. These temporary special measures are particularly necessary should any of the NGOs involved require training or transportation to be purposefully included in the budgetary process.¹⁰¹² Individuals working in women’s rights NGOs may not have sufficient economic experience to read and fully understand national policies and budgets. Thus, comprehensive budgetary training will prove beneficial to the budgetary process. The timeframes can also be set for the duration of a certain stage of the budgetary process, an example being involving women’s groups in the drafting process of a gender responsive budget.

As Elson and Sharp reiterate, participatory budgeting gives local communities a direct say in how local funds are to be utilised to best address local issues.¹⁰¹³ This is

¹⁰¹² See chapter three part 3 4 4 above.

¹⁰¹³ D Elson & R Sharp “Gender Responsive Budgeting and Women’s Poverty” in S Chant (ed) *The International Handbook of Gender and Poverty: Concepts, Research and Policy* (2010) 522 525.

also particularly prevalent in poorer communities where concerns such as water and sanitation, schools and clinics would greatly benefit from the involvement of groups of people who have experience in addressing these types of concerns.¹⁰¹⁴ Again, anti-essentialist feminist legal theory unearths the crucial role that diverse women, who have direct knowledge and experience of their communities' development areas, play in budget formulation. As argued above, Africa is a vastly diverse continent which requires legal solutions which are responsive to the multiplicity of African women.¹⁰¹⁵ The active participation of NGOs and civil society will also encourage greater transparency in the budgetary process and state parties will be able to set joint objectives with the NGOs involved.¹⁰¹⁶

The reporting guidelines for state reporting under the Maputo Protocol require state parties to describe the extent to which civil society, particularly individuals and organisations working on gender issues, were involved in the preparation of the report.¹⁰¹⁷ Reporting to the African Commission is a legal obligation of state parties to the Maputo Protocol which ensures that the African Commission can fulfil its monitoring responsibilities. Thus, as part of the interpretative framework for article 26(2) of the Maputo Protocol, state parties should adhere to their obligation to report to the African Commission on the involvement of NGOs and civil society in the preparation of national budgets. In terms of the OPERA framework, supervisory bodies should also conduct an assessment on the involvement of the public in the budgetary processes and whether NGOs can hold state parties accountable for budgetary decisions.¹⁰¹⁸ As part of the interpretative framework for article 26(2), the African Commission must perform such an assessment when considering the involvement of NGOs in executing the provisions of the Maputo Protocol.

State parties should also budget for the role of National Human Rights Institutions ("NHRIs") in their gender responsive budgets. The NHRIs can take various forms, such as ombudsmen, commissions, or a combination of both.¹⁰¹⁹ The functions of NHRIs

¹⁰¹⁴ 525. See chapter three part 3 4 4 above.

¹⁰¹⁵ See chapter three part 3 3 1.

¹⁰¹⁶ See chapter three part 3 4 4 above for a discussion on the PANTHER principles.

¹⁰¹⁷ UP "Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2010) UP 1.

¹⁰¹⁸ OPERA refers to "outcomes, policy efforts, resources and assessment". Center for Economic and Social Rights (New York) *The OPERA Framework: Assessing Compliance with the Obligation to Fulfil Economic, Social and Cultural Rights* (2012) 22. See chapter four part 4 3 2 2 above.

¹⁰¹⁹ R Murray *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa* (2007) 2.

include playing a facilitative role between supervisory bodies and state parties, making “recommendations on compliance with human rights standards”, raising awareness on international treaties and furthering the involvement of civil society in national law and policy.¹⁰²⁰ Carver has described the role that these bodies play as a “bridge between international human rights standards and their implementation at a national level”.¹⁰²¹ Thus, NHRIs could be utilised to assist state parties in the preparation of state reports and gender responsive budgeting, while ensuring the active and meaningful involvement of NGOs and civil society. The African Commission has recognised the significant contribution that NHRIs could make to human rights realisation when they are allocated sufficient resources and effectively established.¹⁰²² The CEDAW Committee has also noted the important function that these bodies have in ensuring access to justice.¹⁰²³ State parties should consequently ensure that sufficient resources are allocated to the establishment of NHRIs, as well as the continued monitoring and improvement of these bodies.

5 3 2 Generating resources

For state parties to allocate sufficient resources to meet their obligations in terms of article 26(2) of the Maputo Protocol, they first need to generate these resources, and second, these resources have to be effectively spent. As discussed in chapter 3, how state parties raise their revenue and generate resources for the realisation of women’s rights, forms a crucial part of gender responsive budgeting.¹⁰²⁴ State parties to the Maputo Protocol have to ensure that their revenue strategies are in line with the theoretical approaches of gender responsive budgeting. The gender responsive budgeting strategies will also be assessed based on their responsiveness to the needs of diverse women. As part of the interpretative framework, it is suggested that state parties also reassess taxation and international support within their gender responsive budgeting strategies.¹⁰²⁵

¹⁰²⁰ 2.

¹⁰²¹ R Carver “A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law” (2010) 10 *HRLR* 1 2.

¹⁰²² Murray *National Human Rights Institutions* 3 & 4.

¹⁰²³ CEDAW Committee, General Recommendation 33 para 39(a). See chapter four part 4 2 2 6 above for a further discussion on access to justice under CEDAW.

¹⁰²⁴ See chapter three part 3 4 5 above for gender responsive budgeting implementation strategies.

¹⁰²⁵ De Schutter (2018) *Friederich Ebert Stiftung* 27.

5 3 2 1 *Systems of taxation*

With regard to taxation, state parties are required to be cognisant of how different tax policies affect various groups of women. Ensuring that taxation systems are applied equally to both men and women is required by article 13(j) of the Maputo Protocol. Taxation systems in most African countries are underdeveloped. Tax as a share of GDP has been slow to rise or is even on the decline in many poorer African countries.¹⁰²⁶ However, as shown in chapter two, Rwanda is an example of how strong leadership and political will can implement efficient taxation systems which resulted in public revenues increasing by more than 50% since 2001.¹⁰²⁷

Through their various mandates, the African Court, African Commission and Special Rapporteur are also required to monitor whether state parties' taxations systems promote the equality and protection of all women.¹⁰²⁸ As state parties are required to report on their gender responsive budgeting strategies in their state reports, the African Commission would be able to provide feedback on state parties' taxation strategies, as per the framework discussed in the rest of this section.¹⁰²⁹ As discussed earlier in this chapter, the Special Rapporteur should also conduct fact-finding missions across Africa to establish the best taxation practices.¹⁰³⁰ These practices could then be presented to state parties at side sessions at the ordinary sessions of the African Commission.

As discussed above, each state party to the Maputo Protocol would first have to do a taxation assessment to consider the situation of diverse groups of people in respect of how taxation affects their lives, if at all.¹⁰³¹ This strategy was suggested by Budlender as part of revenue review in terms of gender responsive budgeting.¹⁰³² Budlender's strategy was originally designed for implementation in Australia and South Africa. However, as part of generating resources for the realisation of the Maputo Protocol, African countries could, in line with Budlender's strategy, first undertake a taxation assessment. The assessment will be able to clarify who pays taxes and whether the taxation system is currently reaching all citizens. Such a

¹⁰²⁶ Ghosh "Why Taxes will be Central to Africa's Development" (2016) *World Economic Forum* 1.

¹⁰²⁷ 1. See chapter two part 2 2 4 2 1.

¹⁰²⁸ See part 5 2 above.

¹⁰²⁹ UP "Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2010) *UP* 2. See part 5 2 2 2 above.

¹⁰³⁰ See part 5 2 3 above.

¹⁰³¹ See chapter three part 3 4 5.

¹⁰³² Budlender & Hewitt *Engendering Budgets* 103.

taxation assessment needs to consider the employment status, consumption patterns, income levels, poverty levels, and amount of non-monetised care work.¹⁰³³ Only once such an assessment has been carried out and the results analysed against disaggregated data (such as gender, poverty levels, and race), should the state parties to the Maputo Protocol progress to reform their taxation policies. In terms of taxation policies to realise the rights in the ICESCR, De Schutter suggests reconsidering the tax base, a progressive tax structure and the combatting of tax evasion, which as discussed below, are all prominent issues in the African context.¹⁰³⁴

As established in chapter 4, the tax base in poorer countries is generally so low that state parties are unable to mobilise adequate resources for the realisation of human rights and encourage economic growth.¹⁰³⁵ One way in which state parties to the Maputo Protocol can raise the tax base is by eliminating favourable treatment to foreign investors.¹⁰³⁶ Favourable tax treatment has been shown to have little to no impact on the amount of foreign investment attracted to various countries.¹⁰³⁷ Increasing the tax base in this way would also have a significant impact on African countries who are currently attracting significant foreign investment because of their role as emerging markets.

Africa has also seen an increase in foreign direct investment in recent years while there has been an overall decrease globally.¹⁰³⁸ While foreign direct investment can assist to increase the tax base, it should not be used as a means for large corporations to have influence over the human rights and human dignity of the population. Thus, investment treaties need to be drafted with human rights and human dignity at the forefront. With regard to foreign direct investment, the state party has a right to regulate and the duty to protect the rights of their populations.¹⁰³⁹ Due to the fact that the state party is a sovereign entity, they are entitled to hold large corporations accountable for breaches of investment treaties and obligations which adversely affect broader public interests or human rights norms.¹⁰⁴⁰ As Adeleke states, this is a fine

¹⁰³³ 103.

¹⁰³⁴ De Schutter (2018) *Friederich Ebert Stiftung* 27. See chapter four part 4 3 2 1 above.

¹⁰³⁵ 27. See chapter four part 4 3 2 1 above.

¹⁰³⁶ 28.

¹⁰³⁷ See chapter four part 4 3 2 1 above for a discussion on what attracts foreign investment to a country.

¹⁰³⁸ RJ Jere "The State of Foreign Direct Investments in Africa" (2019) *New African* <<https://newafricanmagazine.com/19037/>> (accessed 07-07-2020).

¹⁰³⁹ F Adeleke *International Investment Law and Policy in Africa: Exploring a Human Rights Based Approach to Investment Regulation and Dispute Settlement* (2018) 30.

¹⁰⁴⁰ 31.

balance because while “human rights are fundamental to human dignity”, investment opportunities are instrumental in the achievement of certain policy objectives which indirectly affect human dignity.¹⁰⁴¹

In terms of the framework for generating resources, state parties to the Maputo Protocol are recommended to adopt progressive tax structures.¹⁰⁴² Taxation policies should be cognisant of the impact that different types of tax, such as indirect tax, have on women and the poor. Indirect tax may appear neutral as it is attached to goods and services, however as Budlender argues, poorer households spend a higher percentage of their household income on disposable goods.¹⁰⁴³ Women also carry the disproportionate burden of poverty, thus indirect tax has the most adverse effect on poor women. Decreasing indirect taxation should not have an impact on the tax base as state parties to the Maputo Protocol can increase direct tax on higher-income groups as well as increase corporation tax, as discussed above.¹⁰⁴⁴ As also argued above, having progressive taxation systems is key to generating maximum available resources in terms of the ICESCR.¹⁰⁴⁵ The CESCR reiterates the importance of having taxation systems which consider the most marginalised citizens and that are focused on equality.¹⁰⁴⁶

It is further suggested that state parties to the Maputo Protocol make a conscious effort to combat tax evasion. Tax evasion is particularly concerning for African countries because the average tax to GDP ratio is much lower in developing countries.¹⁰⁴⁷ Anti-essentialist feminist legal theory illuminates the effect tax evasion has on diverse women, as wealthy individuals or corporations who abuse the taxation system force state parties to increase other forms of taxation, such as indirect tax, which, as discussed above, results in poorer households bearing the greatest taxation burden.¹⁰⁴⁸ State parties to the Maputo Protocol should review their national tax legislation and policies, as well as funding institutions which can hold multinational

¹⁰⁴¹ 31.

¹⁰⁴² See chapter four part 4 3 2 1 above for a discussion on progressive tax structures.

¹⁰⁴³ Budlender & Hewitt *Engendering Budgets* 103.

¹⁰⁴⁴ De Schutter (2018) *Friederich Ebert Stiftung* 32.

¹⁰⁴⁵ See chapter four part 4 3 1 1.

¹⁰⁴⁶ CESCR *Concluding Observations on the Initial Report of South Africa* (2018) UN Doc E/C.12/ZAF/CO/1 para 16. See chapter four part 4 3 1 1 above.

¹⁰⁴⁷ Global Forum on Transparency and Exchange of Information for Tax Purposes “Tax Transparency in Africa: Africa Initiative Progress Report 2018” (2019) 6.

¹⁰⁴⁸ MS Carmona *Report of the Special Rapporteur on Extreme Poverty and Human Rights* (2014) A/HRC/26/28 para 60. See chapter four part 4 3 2 1 above.

corporations accountable to tax evasion.¹⁰⁴⁹ State parties should also ensure that they do not offer unregulated tax havens to big corporations and wealthy individuals.¹⁰⁵⁰ Thus, international cooperation between African countries is paramount to combatting tax abuse and ensuring that there is adequate public revenue to meet the obligations set out in the Maputo Protocol.

5 3 2 2 *International cooperation*

To ensure that state parties to the Maputo Protocol have adopted all necessary measures to realise women's rights, they also need to engage in international cooperation. The supervisory bodies must encourage African countries to actively pursue these extraterritorial agreements in order to realise their obligations in terms of the Maputo Protocol. Should cases or communications regarding resource constraints reach the African Court and the African Commission, these supervisory bodies need to enquire whether the state parties have sought relief outside of their borders.¹⁰⁵¹ The African Commission should raise this issue in their concluding observations on state reports, especially, where state parties have not made any mention of international cooperation as part of their gender responsive budgeting. The African Commission should also emphasise the significance of international cooperation and the potential for resources achieved through international cooperation as part of gender responsive budgeting in a general comment focused on article 26(2) of the Maputo Protocol¹⁰⁵²

In terms of the ICESCR, the CESCR stated that the resources gained through international assistance form part of the resources that state parties have to meet their human rights obligations.¹⁰⁵³ The CESCR has also reiterated that the extent of international cooperation is particularly acute when state parties raise resource constraints as a reason for not meeting their obligations.¹⁰⁵⁴ Resource constraints are an issue which many state parties to the Maputo Protocol raise when women's rights are not effectively realised.¹⁰⁵⁵ Thus, state parties should be held liable for a failure to

¹⁰⁴⁹ See chapter four part 4 3 2 1 above.

¹⁰⁵⁰ De Schutter (2018) *Friederich Ebert Stiftung* 34.

¹⁰⁵¹ See part 5 2 above for the interpretative role of the supervisory bodies.

¹⁰⁵² See part 5 2 2 1 above for a discussion on the African Commission releasing a general comment focused on interpreting article 26(2) of the Maputo Protocol.

¹⁰⁵³ Statement of UN Committee on Economic, Social and Cultural Rights (thirty-sixth session, 2007) *An evaluation of the obligation to take steps to the "maximum available resources" under an optional protocol to the covenant* UN Doc E/C. 12/2007/1 para 5.

¹⁰⁵⁴ See chapter four part 4 3 1 5 above.

¹⁰⁵⁵ See part 5 3 5 below for a discussion on resource constraints and African countries.

seek the necessary resources extraterritorially.¹⁰⁵⁶ However, when state parties engage in extraterritorial agreements, it has to be executed in a way that would facilitate, and not impede, debt relief.¹⁰⁵⁷ When foreign debt is relieved, state parties will be able to focus their resources on realising the rights in the Maputo Protocol instead of redirecting resources to reimburse debts.¹⁰⁵⁸ State parties would also not be able to use foreign debt as a reason for resource constraints which impedes their efforts to realise women's rights.

In terms of the interpretative framework for article 26(2) of the Maputo Protocol, state parties are recommended to negotiate extraterritorial gender responsive budgeting agreements within their sub-regional economic communities.¹⁰⁵⁹ The sub-regional economic communities are already established to cooperate with governments, civil society and the AU in raising the standard of living of African people.¹⁰⁶⁰ Thus, state parties to the Maputo Protocol should look to their sub-regional economic communities to begin gender responsive budgeting initiatives.

As discussed above, the SADC Guidelines¹⁰⁶¹ are an example of a sub-regional economic community expressing sub-regional unity and cooperation through the formulation of joint budgeting guidelines.¹⁰⁶² A joint gender responsive budgeting initiative could prove useful if all countries in a sub-regional economic community have ratified the Maputo Protocol, and are thus working towards realising the same obligations. For example, fifteen countries out of the sixteen SADC member states have ratified the Maputo Protocol, thus the SADC state parties must ensure that their sub-regional gender responsive budgeting initiatives are in line with realising the provisions in the Maputo Protocol.¹⁰⁶³ State parties that implement similar gender

¹⁰⁵⁶ See chapter four part 4 3 1 5 above.

¹⁰⁵⁷ De Schutter (2018) *Friederich Ebert Stiftung* 39. See chapter four part 4 3 2 1 above.

¹⁰⁵⁸ 40.

¹⁰⁵⁹ Africa's sub-regional economic communities include eight sub-regional bodies namely, The Arab Maghreb Union, The Economic Community of West African States, The East African Community, The Intergovernmental Authority on Development, The Southern African Development Community, The Common Market for Eastern and Southern Africa, The Economic Community of Central African States and The Community of Sahel-Saharan States.

¹⁰⁶⁰ Office of the Special Advisor on Africa "The Regional Economic Communities (RECs) of the Africa Union" (2016) *UN* <<https://www.un.org/en/africa/osaa/peace/recs.shtml>> (accessed 07-07-2020).

¹⁰⁶¹ The SADC Guidelines are not binding on member states, however, they are discussed in this thesis because of the interpretative value they add to gender responsive budgeting frameworks in Africa. It is also noted that the member states have suspended the SADC Tribunal. Individuals and NGOs are thus not able to challenge these guidelines or gender responsive budgeting initiatives at the SADC level.

¹⁰⁶² See chapter three part 3 4 5 above.

¹⁰⁶³ AU "List of countries which has signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2018) *AU*

responsive budgeting initiatives within a sub-regional group would also be able to turn to their regional groups for financial and technical training.

As established above, the CESCER will consider whether a state party sought international aid should that state party use resource constraints as a reason for not being able to meet their obligations in terms of the ICESCR.¹⁰⁶⁴ The African Commission would also be able to assess whether state parties, that claim they cannot realise the rights in the Maputo Protocol due to resource constraints, have turned to their sub-regional group for assistance and extraterritorial cooperation. In terms of maximum available resources in the ICESCR, it was confirmed that the available resources to a state party include those within the state party as well as those available from the international community.¹⁰⁶⁵

Gender responsive budgeting initiatives should pay careful attention to how state parties generate and spend their resources to ensure that all women in the regions are protected and empowered. The expenditure side of the gender responsive budgeting initiative forms the next crucial part of the interpretative framework for article 26(2) of the Maputo Protocol and is addressed in the following part.

5 3 3 Spending resources

The expenditure side of the gender responsive budgeting initiative requires state parties to contextually examine the rights of women recognised in the Maputo Protocol and how they are applicable in their countries. These initiatives would be established differently in every member state. Thus, it would not be practical for this research to recommend an exact strategy that would work effectively in the context of every country.¹⁰⁶⁶ However, there are a few identifiable areas where state parties to the Maputo Protocol need to ensure that women with intersecting identities, who face

<https://au.int/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa_7.pdf> (accessed 07-07-2020). Botswana is the only SADC member state which has not ratified the Maputo Protocol, however, it has ratified CEDAW and the ICESCR. Thus, the SADC sub-regional community can still form a comprehensive gender responsive budgeting initiative because there is enough cross-over with the obligations for resource mobilisation for human rights in the Maputo Protocol, CEDAW and the ICESCR.

¹⁰⁶⁴ *An evaluation of the obligation to take steps to the "maximum available resources" under an optional protocol to the covenant* para 10(f). See chapter four part 4 3 1 5.

¹⁰⁶⁵ See chapter four part 4 3 1 1 above for a discussion on maximum available resources.

¹⁰⁶⁶ See chapter three part 3 4 5 above for a discussion on the different gender responsive budgeting strategies.

multiple forms of discrimination, are protected and empowered. Most gender responsive budgeting strategies, as discussed in chapter 3, do not encompass theories of anti-essentialist feminist legal theory. Thus, state parties to the Maputo Protocol must ensure that their gender responsive budgeting initiatives are formulated and implemented to be sensitive to the needs of the diverse women in their countries. The gender responsive budgeting strategies of South Africa, as an example, prioritised the socio-economic needs of poor women and ensured they remained at the forefront of further budgeting strategies.¹⁰⁶⁷

Chapter 2 established that full and effective implementation of the rights contained in the Maputo Protocol, require extensive resources as well as realisation over time.¹⁰⁶⁸ Thus, constant progression towards the full realisation of these rights is required. State parties should identify the immediate steps which they will take in their gender responsive budgeting strategies as well as how the rights in the Maputo Protocol will be realised over time. It was argued above that, while article 26(2) of the Maputo Protocol does not directly mention progressive realisation, the full and effective implementation of the rights in the Maputo Protocol will require concrete and targeted steps.¹⁰⁶⁹ These concrete steps also create an obligation on state parties to take immediate steps.¹⁰⁷⁰ This was established by the African Commission in the *Purohit* communication.¹⁰⁷¹ Immediate steps are also established as essential by the CESCER with regard to progressive realisation in article 2(1) of the ICESCR.¹⁰⁷² As argued above, while realising human rights progressively may be long term, there are deliberate, concrete and targeted steps which can be made in the short term.¹⁰⁷³

The first step in most gender responsive budget strategies includes the state gathering information and statistics about gender disparities.¹⁰⁷⁴ The purpose of such

¹⁰⁶⁷ See chapter two part 2 2 4 2 2 above. Republic of South Africa “Combined Second Periodic Report under the African Charter on Human and People’s Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa” (2015) *ACHPR* <http://www.achpr.org/files/sessions/58th/state-reports/2nd-2002-2015/staterep2_southafrica_2003_2014_eng.pdf>.

¹⁰⁶⁸ See chapter two part 2 2 1 above.

¹⁰⁶⁹ See chapter two part 2 3 1 above.

¹⁰⁷⁰ *Amin A teleological approach to the interpretation of socio-economic rights* 293. See chapter two part 2 3 1 above.

¹⁰⁷¹ Communication 241/01 (2003).

¹⁰⁷² See chapter four part 4 3 1 2 above.

¹⁰⁷³ CESCER General Comment 3 *The nature of states parties’ obligations* (1990) UN Doc E/1991/23 para 2. See chapter four part 4 3 1 2 above.

¹⁰⁷⁴ See chapter three part 3 4 5 above and in particular, Budlender’s five steps for gender responsive budgeting implementation.

fact-finding and analysis is to gain a deeper understanding of the specific context of different groups of women in the country.¹⁰⁷⁵ It is important that state parties account for the resource-intensive nature of the collection of disaggregated data. Thus, before a comprehensive gender responsive budget can be designed, state parties need to allocate sufficient resources to the gathering of information and statistics of gender disparities within their country.

By gaining a better understanding of the specific needs of the women in the country, the state party would be better equipped to establish and implement a context-specific gender responsive budgeting strategy. Information regarding diverse women should be included in these statistics. This includes information about poverty, sexuality, race, language, rural areas, culture, and religion. Thus, in terms of the interpretative framework for article 26(2) of the Maputo Protocol, state parties should assess how current budgetary allocations affect all women in the country.¹⁰⁷⁶ Following these initial steps, state parties would be able to design gender responsive budgeting strategies which ensure the protection and empowerment of all women. Through an assessment of the current state of diverse women in the country, they would also be ensuring that they adhere to their obligations to protect vulnerable women.¹⁰⁷⁷

As mentioned above, SADC has released its own guidelines in which it encourages its member states to implement gender responsive budgeting initiatives.¹⁰⁷⁸ The other sub-regional economic communities are also encouraged to establish and implement their own gender responsive budgeting guidelines for expenditure. The creation of sub-regional strategies encourages joint objectives to realise women's rights within a sub-regional group. While these sub-regional gender responsive budgeting strategies are non-binding, as the SADC Guidelines are, the African Commission can make use of sub-regional benchmarks to monitor progress and resource allocation when assessing state reports within that sub-region.¹⁰⁷⁹

The most significant point, as illuminated by gender responsive budgeting theory, is that state parties take a holistic approach to their national budget expenditure. Thus,

¹⁰⁷⁵ Budlender & Hewitt *Engendering Budgets* 92.

¹⁰⁷⁶ See chapter three part 3 4 5 above. Budlender & Hewitt *Engendering Budgets* 97.

¹⁰⁷⁷ Article 22 of the Maputo Protocol (special protection of elderly women), article 23 (special protection of women with disabilities) and article 24 (special protection of women in distress).

¹⁰⁷⁸ Southern African Development Community Guidelines on Gender Responsive Budgeting (2014) 31.

¹⁰⁷⁹ See part 5 3 2 above for a discussion on regional economic communities.

a gender analysis should be conducted on every aspect of a country's budgets and policies.¹⁰⁸⁰ State parties to the Maputo Protocol should ensure that every category of expenditure is reviewed in terms of its impact on diverse groups of women. For example, when considering health care expenditure, state parties must be cognisant of the fact women have specific sexual and reproductive needs which should be accounted for in national budgets and policies. The state parties to the Maputo Protocol must manage their expenditure for health care accordingly while keeping these issues at the forefront.

As part of Rwanda's gender responsive budgeting strategy, pilot sectors were selected to trial the new budgeting strategy.¹⁰⁸¹ The leaders and task teams within the pilot sectors were provided with in-depth training and support.¹⁰⁸² Thus, once success was exhibited in the pilot sectors, plans could be put into place to roll out the strategy to more sectors. The following section considers specific resource-intensive provisions which should be carefully and holistically addressed in state parties' gender responsive budgeting initiatives. These provisions are specifically addressed because they require extensive resources and, thus, cannot be considered in isolation from article 26(2) of the Maputo Protocol. The CEDAW Committee and CESCR have correspondingly recognised these provisions as resource intensive, as discussed in chapter 3. State parties to the Maputo Protocol could arguably elect these provisions as pilot sectors for their gender responsive budgeting initiatives, as Rwanda had done.¹⁰⁸³

5 3 4 Resource-intensive provisions

In order to effectively allocate resources to realise women's rights, state parties should undertake a detailed analysis of the obligations imposed by each of the rights in the Maputo Protocol. The state parties should then ensure that their gender responsive budgeting initiatives enable them to fulfil these obligations. The following sub-sections

¹⁰⁸⁰ See chapter three part 3 4 5 above for a further discussion on the holistic nature of gender responsive budgeting.

¹⁰⁸¹ See chapter two part 2 2 4 2 1 above for an analysis of Rwanda's gender responsive budgeting initiatives.

¹⁰⁸² Kabaya "Presentation to "Gender in MENA Projects: Promoting Women's Economic Empowerment"" (2009) *Worldbank* 8.

¹⁰⁸³ See chapter two part 2 2 4 2 1 above.

briefly addresses the substantive contents of some of the more resource-intensive provisions in the Maputo Protocol.¹⁰⁸⁴

5 3 4 1 *Prohibition of discrimination*

Article 2(1) of the Maputo Protocol provides that state parties are obligated to “combat all forms of discrimination against women through appropriate legislative, institutional and other measures”. As shown in *APDF*, the African Court requires state parties to ensure that their national laws are harmonised with relevant international instruments.¹⁰⁸⁵ The African Court ordered Mali to amend the Malian Persons and Family Code¹⁰⁸⁶ due to its discriminatory nature against women.¹⁰⁸⁷ The African Court also emphasised the importance of nationwide educational programmes and initiatives which would address the changes in legislation and ensure all citizens are aware of the amendments.¹⁰⁸⁸ Thus, as argued above, state parties have an obligation to ensure that resources are allocated towards, not only the amendment of discriminatory legislation but also to the changing of national perceptions and attitudes.¹⁰⁸⁹

The CEDAW Committee has also commented, through the use of general recommendations, on the need for women and NGOs to be involved in the development of non-discrimination policies.¹⁰⁹⁰ Thus, state parties are required to allocate sufficient resources to ensure the active participation of women’s groups and NGOs.¹⁰⁹¹ The CEDAW Committee has reiterated the need for an understanding of intersectional discrimination and the multiple identities of women when formulating and implementing non-discrimination policies.¹⁰⁹² As shown above, the CESC highlighted the importance of ensuring that non-discrimination legislation serves the most vulnerable or marginalised groups in society.¹⁰⁹³ Marginalised groups of people,

¹⁰⁸⁴ It is beyond the scope of this research to discuss the substantive interpretation of each of the rights in the Maputo Protocol. See chapter one part 1 3 above.

¹⁰⁸⁵ See chapter two part 2 2 2 above.

¹⁰⁸⁶ Law No 2011 – 087 of 30 December 2011.

¹⁰⁸⁷ *APDF and IHRDA v Republic of Mali* Application No 046/2016 para 130.

¹⁰⁸⁸ Para 131.

¹⁰⁸⁹ Chapter two part 2 2 2 above.

¹⁰⁹⁰ CEDAW Committee, General Recommendation 28 *The Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women* UN Doc CEDAW/C/GC/28 (2010) para 27. See chapter four part 4 2 2 1 above.

¹⁰⁹¹ See part 5 3 1 above.

¹⁰⁹² Para 18.

¹⁰⁹³ UN Committee on Economic, Social and Cultural Rights, General Comment 20 (forty second session, 2009) *Non-discrimination in economic, social and cultural rights (Art. 2, para 2, of the*

particularly women facing multiple levels of discrimination, require a state party's full commitment to ensuring that national legislation and policy are non-discriminatory and support substantive equality.¹⁰⁹⁴

The *Kell* communication further demonstrated how imperative an understanding of anti-essentialist feminist legal theory is when interpreting the discrimination that women face.¹⁰⁹⁵ The author in *Kell*, as an aboriginal woman, was in a vulnerable position claiming her property rights and reporting domestic violence, and the state party is obligated to ensure the elimination of such discrimination.¹⁰⁹⁶ The CEDAW Committee stated that temporary special measures, such as the creation of task teams and supervisory bodies, would be necessary to identify and address the multiple layers of discrimination that women face.¹⁰⁹⁷

Therefore, as part of the framework for interpreting article 26(2) of the Maputo Protocol state parties should allocate resources to the elimination of discrimination against women, including multiple levels of discrimination in three main ways. This involves, firstly, utilising temporary special measures, such as the creation of task teams and involving women's interests NGOs in identifying the multiple levels of discriminations; secondly, amending discriminatory legislation; and thirdly, investing into educational programmes which assist in changing national perceptions and attitudes.

5 3 4 2 *Gender-based violence*

Eradicating violence against women is resource intensive and requires full commitment from state parties. Article 4(2) of the Maputo Protocol provides for the right to security of the person and particularly states that "state parties shall take appropriate and effective measures to: (i) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women".

International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/20. See chapter four part 4 3 1 6.

¹⁰⁹⁴ CESCR General Comment 5 *Persons with Disabilities* UN Doc E/1995/22 (1994) para 9.

¹⁰⁹⁵ Communication No 19/2008, CEDAW/C/51/D/19/2008 (27 April 2012). See chapter four part 4 2 2 1 above.

¹⁰⁹⁶ Para 10.3.

¹⁰⁹⁷ CEDAW Committee, General Recommendation 27 para 12. Article 4 of CEDAW refers to temporary special measures. See chapter four part 4 2 2 1 below.

The crucial issue of eliminating gender-based violence has to be included in state parties' gender responsive budgeting initiatives. As discussed above, resources need to be deployed to, for example, increase police training, provide women's shelters, provide services for survivors of sexual or domestic violence and equal access to justice for all women.¹⁰⁹⁸ In chapter 4, the response of the CEDAW Committee and state parties to the allocation of resources to the eradication of gender-based violence was analysed.¹⁰⁹⁹ The CEDAW Committee reiterated that where a state party does not provide adequate shelters for women and children, counselling services, and psychological treatment centres, it constitutes a violation of the state party's obligation to protect women.¹¹⁰⁰ Attention needs to be paid to intersecting areas of discrimination which can result in violence against women. This includes violence against women due to, for example, homophobia, racism or xenophobia.

As discussed above, the CEDAW Committee emphasised the importance of ensuring that police personnel, law enforcement, judges, and prosecutors receive adequate and appropriate gender sensitivity training to ensure they can effectively deal with cases of gender-based violence.¹¹⁰¹ Thus, to ensure that state parties to the Maputo Protocol protect their citizens against gender-based violence, nationwide gender sensitivity training would need to form part of their gender responsive budgeting initiatives. These training and educational programmes would also need to incorporate information on how intersecting degrees of discrimination can compound the gender-based violence that some women experience.¹¹⁰²

State parties are required to actively work to eliminate the stigmatisation around domestic violence as many women who have experienced violence are often forced by their community, in particular rural communities, or the police to remain with their perpetrators as they are considered "tainted" women.¹¹⁰³ Thus, state parties to the

¹⁰⁹⁸ Mutiithi "An analysis of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" in B Kombo et al *Journey to equality: 10 years of the Protocol on the Rights of Women in Africa* (2013) 44. See chapter two part 2 2 1 above.

¹⁰⁹⁹ See chapter four part 4 2 2 2 above.

¹¹⁰⁰ *VK v Bulgaria* Communication No 20/2008, CEDAW/C/49/D/20/2008 (27 September 2011) para 9.13; *X and Y v Georgia* Communication No 24/2009, UN Doc CEDAW/C/61/D/24/2009 (2015) para 11(b)(i). See chapter four part 4 2 2 2 above.

¹¹⁰¹ *Jallow v Bulgaria* Communication No 32/2011, UN Doc CEDAW/C/52/D/32/2011 (28 August 2012) para 8.8(2)(c). See chapter four part 4 2 2 2 above.

¹¹⁰² See chapter four part 4 2 2 2 above.

¹¹⁰³ OHCHR "Break the Cycle of Silence and Acceptance of Violence Against Women' Expert Urges Georgia" (2016) *United Nations Human Rights Office of the High Commissioner*

Maputo Protocol must ensure the availability of not only shelters for victims of domestic violence, but also resources to be allocated to housing and employment opportunities. These opportunities would assist in women not being rendered more vulnerable, which could result in them returning to their perpetrators.¹¹⁰⁴ This could also protect victims of domestic violence from further abuse.

State parties to the Maputo Protocol are recommended to ensure that their police, courts and judicial personnel are free from gender stereotypes which would deter women from reporting cases of gender-based violence and receiving the justice required.¹¹⁰⁵ The eradication of such gender stereotypes will be resource intensive for state parties because it will involve educational programmes and training for judicial personnel and the police. The CEDAW Committee further elaborated upon the gender-sensitive training which is required to ensure that women are better protected in cases of domestic violence in *RPB, Vertido and Jallow*.¹¹⁰⁶

Women who face intersecting levels of discrimination are more at risk of gender-based violence.¹¹⁰⁷ Thus, as part of the interpretative framework for article 26(2) of the Maputo Protocol, it is recommended that state parties allocate resources towards the adoption of appropriate legal and policy responses which ensure that all women are protected against gender-based violence. In response to increased gender-based violence against women with multiple identities, the CEDAW Committee stated that state parties have to adopt measures which would prevent, investigate, prosecute and adequately punish these crimes, as well as providing reparations to the victims.¹¹⁰⁸ This could, once again, require state parties to the Maputo Protocol to adopt temporary special measures in the form of task teams or monitoring bodies which specialise in the eradication of gender-based violence.

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17087&LangID=E>> (accessed 07-07-2020). See chapter four part 4 2 2 2 above.

¹¹⁰⁴ 1.

¹¹⁰⁵ The existence and eradication of gender stereotypes is further addressed in part 5 3 4 1 above and 5 3 4 3 below.

¹¹⁰⁶ Communication No 34/2011, UN Doc CEDAW/C/57/D/34/2011 (21 February 2014); Communication No 18/2008, UN Doc CEDAW/C/46/D/18/2008 (22 September 2010); Communication No 32/2011, UN Doc CEDAW/C/52/D/32/2011 (28 August 2012). See chapter four part 4 2 2 2 above.

¹¹⁰⁷ CEDAW Committee, General Recommendation 35 *Gender-based Violence Against Women, Updating General Recommendation No. 19* UN Doc CEDAW/C/GC/35 (2017). para 12. See chapter four part 4 2 2 2 above.

¹¹⁰⁸ CEDAW Committee *Concluding Observations on the Seventh Periodic Report of Costa Rica* (2017) UN Doc CEDAW/C/CRI/CO/7 para 17(f).

5 3 4 3 *Prohibition of harmful stereotyping*

Article 2(2) of the Maputo Protocol provides that “state parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies”. As argued above, the persistence of gender stereotypes can lead to harmful practices against women.¹¹⁰⁹ Article 5 of the Maputo Protocol provides that “state parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards”.

As shown in *APDF*, ensuring the prohibition of harmful stereotyping has numerous resource implications for state parties.¹¹¹⁰ This includes educational programmes, awareness campaigns, amending legislation, setting up task teams as well as ensuring that victims of harmful stereotyping have effective avenues to justice. Thus, state parties need to understand that an important part of their obligation to prevent harmful stereotyping involves mobilising resources as per article 26(2) of the Maputo Protocol. As required by article 5(a) of the Maputo Protocol, state parties are obligated to prohibit and condemn all forms of harmful practices which includes the “creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes”. The African Court reiterated the significance of widespread educational programmes to eradicate harmful stereotyping in *APDF*.¹¹¹¹ However, it is still concerning that the African Court founded this remedy in terms of article 25 of the ACHPR and not the Maputo Protocol.

Article 12(1)(b) furthermore requires state parties to eliminate all harmful stereotypes in textbooks, syllabuses and the media. As argued above, state parties to CEDAW are obligated to adopt educational and public information programmes which would eradicate harmful prejudices, stereotypes and practices.¹¹¹² These educational initiatives have to include information on multiple levels of discrimination and stereotypes which can affect diverse African women. The CEDAW Committee also reiterated how harmful stereotypes and practices can lead to women facing increased gender-based violence and inhibited access to justice.¹¹¹³

¹¹⁰⁹ See chapter four 4 2 2 3 above.

¹¹¹⁰ Application No 046/2016. See chapter two part 2 2 2 above.

¹¹¹¹ Application No 046/2016. See chapter two part 2 2 2 above.

¹¹¹² See chapter four part 4 2 2 3 above.

¹¹¹³ See chapter four part 4 2 2 3 above.

5 3 4 4 Access to justice

Article 8 of the Maputo Protocol provides that state parties are obligated to ensure that “women and men are equal before the law and shall have the right to equal protection and benefit of the law”. State parties to the Maputo Protocol must therefore allocate resources to realise women’s right to access to justice through the elimination of gender stereotypes, ensuring women have knowledge of their rights under the Maputo Protocol, and the provision of low-cost or free legal aid.

As stated above, harmful gender stereotypes can negatively affect women’s right to access to justice.¹¹¹⁴ The CEDAW Committee reiterated that women are often discriminated against when seeking justice because of the perceived role that women must remain silent and obedient to men.¹¹¹⁵ In the *RPD* Communication, the court system had discriminated against the author, who was a rape victim, based on preconceived stereotypes of how rape victims should act when confronted with violence.¹¹¹⁶ State parties are obligated to ensure their justice systems undergo capacity-building programmes to strengthen gender responsiveness and gender sensitivity, especially focused on women who face intersecting forms of discrimination.¹¹¹⁷ As part of the interpretative framework for article 26(2) of the Maputo Protocol, it is recommended that state parties allocate sufficient resources to ensure their justice systems receive appropriate gender sensitivity capacity-building training.

Another issue which state parties to the Maputo Protocol need to address, is women, especially those belonging to disadvantaged groups, not being aware of their rights under the Maputo Protocol, and thus, not being able to pursue justice. The CEDAW Committee has addressed this issue and recommended that state parties, in cooperation with civil society groups enhance awareness of CEDAW and the remedies that are available to women.¹¹¹⁸ One of the ways in which state parties to the Maputo Protocol can ensure more women have access to justice is, addressing language

¹¹¹⁴ See part 5 3 4 2 above.

¹¹¹⁵ See chapter four part 4 2 2 6 above.

¹¹¹⁶ Communication No 34/2011, UN Doc CEDAW/C/57/D/34/2011 (21 February 2014) para 8.8.

¹¹¹⁷ CEDAW Committee *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of the Philippines* (2016) UN Doc CEDAW/C/PHL/CO/7-8 para 16(a) & (b). See chapter four part 4 2 2 6 above.

¹¹¹⁸ CEDAW Committee *Concluding Observations on the Sixth Periodic Report of the Bahamas* (2018) UN Doc CEDAW/C/BHS/CO/6 para 14(c).

barriers and ensuring women have access to information regarding the legal remedies available to them.¹¹¹⁹

Finally, as part of the interpretative framework for article 26(2) of the Maputo Protocol, state parties should provide adequate budgetary and technical assistance to the provision of low-cost or free legal aid, advice and representation. This has been identified by the CEDAW Committee as a way for state parties to ensure that all justice systems are economically accessible to women.¹¹²⁰ These low-cost or free services have to be sensitive to the needs of diverse women so that when women seek justice, they are met with appropriate and effective assistance.

5 3 4 5 *Non-monetised care work*

Article 13 of the Maputo Protocol (economic and social welfare rights) provides that “state parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall: (h) take the necessary measures to recognise the economic value of the work of women in the home”. The supervisory bodies need to pay special attention to the needs of women who partake in non-monetised care work. The African Court and African Commission have not yet heard complaints regarding non-monetised care work. When these supervisory bodies are confronted with a case or communication on non-monetised care work, they should make progressive decisions regarding the resources that state parties need to mobilise to support and protect women who partake in the non-monetised care economy. This would include budgeting for childcare facilities and public transport, as further discussed in this section. The African Commission has not yet released a general comment on non-monetised care work which could add immense interpretative value to article 26(2) of the Maputo Protocol.¹¹²¹

Particular attention should be paid to women living in poverty. African women still bear a disproportionate burden of poverty, non-monetised labour, discriminatory land ownership, discriminatory inheritance rights as well as limited access to education and

¹¹¹⁹ See chapter four part 4 2 2 6 above.

¹¹²⁰ CEDAW Committee, General Recommendation 33 para 36. See chapter four part 4 2 1 3 above.

¹¹²¹ See chapter two part 2 2 3.

adequate health care services.¹¹²² Thus, when African states establish a gender responsive budgeting strategy which is adequate in their context, the needs of women in poverty, carrying out the bulk of the non-monetised care work, should be at the forefront of these plans. As argued above, state parties to CEDAW need to pay attention to the particular needs of rural women, especially those involved in non-monetised care work.¹¹²³ Thus, for African countries, where a large majority of rural women partake in the non-monetised care economy, non-monetised care work needs to be directly addressed in national expenditure. Anti-essentialist feminist legal theory assists in unearthing the significant impact of non-monetised care work on women and girls in poorer communities. African countries need to invest in childcare facilities, agricultural technology, public transport and infrastructure such as water, sanitation and energy, which all has the potential to reduce the amount of non-monetised care work done by women in poorer communities.¹¹²⁴

The non-monetised care economy is an important area where state parties to the Maputo Protocol need to invest resources. Non-monetised care work should be regarded as work and states should conduct time-use studies which would quantify the amount of non-monetised care work currently being done.¹¹²⁵ Elson argues that substantive equality can only be achieved if non-monetised care work is recognised, reduced and redistributed.¹¹²⁶ A recent Oxfam study on non-monetised care work in Africa moreover suggested the meaningful inclusion of non-monetised care workers in “national, community and household budgets, planning, policy and decision-making processes”.¹¹²⁷ The inclusion of non-monetised care workers in these processes is a requirement of gender responsive budgeting.¹¹²⁸ As part of the interpretative framework for article 26(2), state parties to the Maputo Protocol should collect national time-use data on non-monetised care work to inform their policy and budget decisions.¹¹²⁹ Specific resources must be allocated to “affordable, accessible and

¹¹²² Chiwara “Situating the Maputo Protocol in Key Issues: Changing the narrative for women in Africa” in AU “Women’s Rights in Africa” 20. See chapter three part 3 3 1 above.

¹¹²³ See chapter four part 4 2 2 6.

¹¹²⁴ Elson & Sharp “Gender Responsive Budgeting and Women’s Poverty” in *The International Handbook of Gender and Poverty* 526.

¹¹²⁵ See chapter three part 3 4 5 above.

¹¹²⁶ Elson (2017) *New Labor Forum* 52. See chapter four part 4 2 2 6.

¹¹²⁷ Oxfam Policy Brief “Unlocking Sustainable Development in Africa by Addressing Unpaid Care and Domestic Work” (2020) 4.

¹¹²⁸ As discussed in part 5 3 1 above.

¹¹²⁹ 12.

quality care-supporting infrastructure and public services such as clean water, renewable energy, childcare, health care and public transport".¹¹³⁰

Non-monetised care work also needs to be addressed in state parties' expenditure on social security. As women who partake in non-monetised care work do not earn an income, they will not be able to contribute to retirement funds and, subsequently, could be discriminated against when receiving social security.¹¹³¹ Ensuring the equal enjoyment of social security requires significant resources from state parties.¹¹³² As addressed in *Calero*, public policies and legislation pertaining to social security needs to take account of the unique circumstances and inequalities faced by women who do non-monetised care work.¹¹³³ As required by article 13 of the Maputo Protocol, state parties need to ensure that the expenditure on social security is reassessed and all women who partake in non-monetised care work are protected.

In terms of the Solemn Declaration, state parties also agreed to increase the budgetary allocations to health care sectors with the aim of alleviating women's burden of care for the sick and elderly.¹¹³⁴ This was specifically stated with regard to those living with malaria, HIV/AIDS, tuberculosis and other related infectious diseases. Unfortunately, the Solemn Declaration makes no further mention of resource allocation, despite addressing resource-intensive obligations such as state parties having to address gender-based violence. Eradicating gender-based violence requires profound budgetary commitments from state parties.¹¹³⁵ Thus, it is problematic that the Solemn Declaration does not emphasise the role that resources play in realising these obligations.

5 3 4 6 *Health care*

Article 14 of the Maputo Protocol provides for extensive health and reproductive rights for women. This includes the obligation on state parties to respect and promote women's right to health and to take all appropriate measures to provide adequate,

¹¹³⁰ 12.

¹¹³¹ Rubin & Bartle (2005) *Public Administration Review* 259 260. See chapter four parts 4 2 1 6 and 4 3 1 6 above.

¹¹³² See chapter four part 4 3 1 6 above.

¹¹³³ Views adopted by the Committee under the Optional Protocol to the Covenant concerning communication No. E/C.12/63/D/10/2015 (2018) para 13.3.

¹¹³⁴ Solemn Declaration para 1.

¹¹³⁵ See part 5 3 4 2 for a discussion on the resources required to address gender-based violence.

affordable and accessible health services.¹¹³⁶ The African Commission has released two general comments on article 14 of the Maputo Protocol, in which it reiterates the importance of mobilising resources to realise women's right to health care.¹¹³⁷ This forms an interpretative tool as state parties have more clarity of their obligations in terms of article 14 and article 26(2) of the Maputo Protocol. These obligations include ensuring that there are adequate budgetary allocations at national and local level to strengthen public health services.¹¹³⁸ It is recommended that the African Commission refer back to these general comments when considering state reports and assessing how state parties have allocated resources to ensure women have access to health care.

As discussed above, barriers to women's access to health care, particularly sexual and reproductive health services, should be eliminated to ensure substantive equality within health care.¹¹³⁹ In order to achieve this, the CEDAW Committee reiterates that state parties overall budget allocated to women's health care should be comparable to men's health, while being cognisant of the different health needs of men and women.¹¹⁴⁰

Thus, in terms of the interpretative framework for article 26(2) of the Maputo Protocol, state parties should allocate resources to ensure women's specific health needs are met. This includes ensuring that there are specialised health care services for victims of gender-based violence and sexual assault.¹¹⁴¹ Specialised health care services include psychologists and trained health care workers who have undergone gender-sensitive training. Thus, state parties to the Maputo Protocol are obligated to allocate significant resources to the provisions of health care services which provides adequate protection to victims of gender-based and sexual violence.

¹¹³⁶ Article 14(1) and 14(2)(a) respectively.

¹¹³⁷ General Comment 1 on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, African Commission on Human and Peoples' Rights (2012) Adopted at the 52nd Ordinary Session; General Comment 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, African Commission on Human and Peoples' Rights (2014) Adopted at the 55th Ordinary Session.

¹¹³⁸ General Comment 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, African Commission on Human and Peoples' Rights (2014) Adopted at the 55th Ordinary Session para 62.

¹¹³⁹ CEDAW Committee, General Recommendation 24 *Women and Health* UN Doc A/54/38/Rev.1, chap1 (1999) para 31(b). See chapter four part 4 2 2 4.

¹¹⁴⁰ Para 30.

¹¹⁴¹ *VPP v Bulgaria* Communication No 31/2011, UN Doc CEDAW/C/53/D/31/2011 (27 November 2012) para 9.10.

State parties to the Maputo Protocol must ensure that their health budgets have provided for women's access to safe motherhood and emergency obstetric services. The CEDAW Committee stated that maternal mortality must be prominent in national health care budgets.¹¹⁴² One of the main ways to do this is to allocate sufficient resources to establish duly equipped hospitals, especially in rural and remote areas.¹¹⁴³ Women in poorer or remote areas are more vulnerable without adequate health care. State parties to the Maputo Protocol must ensure that diverse women, particularly those in poorer or remote areas have access to appropriate and adequate health care.

5 3 5 Resource constraints

State parties have an obligation to progressively realise the rights in the Maputo Protocol, even when there are apparent resource constraints.¹¹⁴⁴ The African Court and the African Commission have not made concrete decisions on the implications of article 26(2) of the Maputo Protocol. However, the African Commission took a firm stance in *SERAC*¹¹⁴⁵ where it stated that there is no right in the ACHPR that cannot be made effective, despite apparent resource constraints.¹¹⁴⁶ By taking a similar stance concerning the Maputo Protocol, the African Commission and African Court would need to establish, on an individual basis, whether a state party has done everything in their power to realise the rights in the Maputo Protocol. This is significant where poverty and scarce resources are a reality.¹¹⁴⁷

As established above, state parties to the ICESCR are obliged to progressively realise the rights in the ICESCR.¹¹⁴⁸ The two norms of progressive realisation are, firstly, that deliberately retrogressive measures require careful consideration and justification and, secondly, that state parties, when facing resource constraints, should at least ensure the minimum essential levels of the rights in the ICESCR.¹¹⁴⁹ The

¹¹⁴² *Alyne da Silva Pimentel v Brazil* Communication No 17/2008, UN Doc CEDAW/C/49/D/17/2008 (27 September 2011) para 7.3.

¹¹⁴³ CEDAW Committee *Concluding Observations on the Eighth Periodic Report of Democratic Republic of Congo* (2019) UN Doc CEDAW/C/COD/CO/8 para 37(a).

¹¹⁴⁴ Chenwi (2013) *De Jure* 742 743. See chapter two part 2 2 1 above.

¹¹⁴⁵ Communication 155/96 (2001).

¹¹⁴⁶ Para 68. See chapter two part 2 3 1 above.

¹¹⁴⁷ Ssenyonjo (2011) *Netherlands Quarterly of Human Rights* 388.

¹¹⁴⁸ See chapter four part 4 3 1 2 above.

¹¹⁴⁹ De Schutter (2018) *Friederich Ebert Stiftung* 10.

CESCR engaged with retrogressive measures in the *Djazia* communication and stated that budgetary adjustments affecting the rights in the ICESCR must be “temporary, necessary, proportional and non-discriminatory.”¹¹⁵⁰ State parties have a heavy burden of justification for retrogressive measures and any retrogressive measure needs to be considered and justified.¹¹⁵¹ These measures should also ensure that the rights of disadvantaged and marginalised groups are not adversely affected.¹¹⁵²

Thus, when considering resource constraints of the state parties to the Maputo Protocol, the African Commission and the African Court should, similarly, consider what state parties were able to achieve with limited resources as well as their justification for retrogressive measures as a result of resource constraints. State parties should also have a heavier burden of justification if these retrogressive measures adversely affected disadvantaged or marginalised groups, such as women in poorer communities.¹¹⁵³ In this way, the retrogressive measures would be under a strict review process to ensure they are proportional and non-discriminatory.

In *Endorois*,¹¹⁵⁴ the African Commission stated that the state party bears the burden of proving whether an action is reasonable.¹¹⁵⁵ Thus, the African Commission and African Court can, correspondingly, require state parties to the Maputo Protocol to show that, even in the context of resource constraints, they took reasonable measures to realise the rights, including prioritising minimum core obligations of vulnerable and disadvantaged groups, and engaging in participatory planning for progressively achieving the full realisation of the relevant rights. As discussed earlier in this chapter, the African Court and African Commission should also evaluate whether state parties have sought extraterritorial agreements where they have apparent resource constraints.¹¹⁵⁶

¹¹⁵⁰ *Djazia and Bellili v Spain* (2017) “Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015” UN Doc E/C. 12/61/D/5/2015 para 17.6. See chapter four part 4 3 1 3 above.

¹¹⁵¹ OHCHR “Report on austerity measures and economic and social rights” (2013) *The Office of the United Nations High Commissioner for Human Rights* <https://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf> (accessed 07-07-2020); CESCR General Comment 3 para 9. See chapter four part 4 3 1 3 above for a further discussion on retrogressive measures.

¹¹⁵² Statement of UN Committee on Economic, Social and Cultural Rights (fifty-eighth session, 2016) *Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights* UN Doc E/C. 12/2016/1 para 4. See chapter four part 4 3 1 3 above.

¹¹⁵³ Liebenberg *Socio-Economic Rights* 190. See chapter four part 4 3 1 3 above.

¹¹⁵⁴ Communication 276/03 (2010).

¹¹⁵⁵ Para 172. See chapter two part 2 3 1 above.

¹¹⁵⁶ See part 5 3 2 2 above for a discussion on international cooperation.

This is supported by the CESCR, as resource constraints need to be taken into consideration to assess whether the states have discharged their minimum core obligation.¹¹⁵⁷ However, there is a “heavy burden of justification” on the state to show that it has exhausted its resources to fulfil its minimum core obligation.¹¹⁵⁸ Here it is necessary to establish whether the state has taken all available steps to the maximum of its available resources as per article 2(1) of the ICESCR. The CESCR makes the final determination about whether state parties have undertaken all appropriate means to realise the rights in the ICESCR.¹¹⁵⁹ Thus, the African Commission and the African Court should make the final decision where state parties argue that they cannot realise the rights in the Maputo Protocol because of resource constraints.

5 4 Conclusion

This chapter sought to establish a new interpretative approach for article 26(2) of the Maputo Protocol. This was done through the lens of gender responsive budgeting and anti-essentialist feminist legal theory. The role of the supervisory bodies were discussed first as they provide the core interpretation of resource allocation through their various mandates.¹¹⁶⁰ The African Court can provide interpretation to article 26(2) through referring to its application in the cases that come before it involving rights in the Maputo Protocol. Particularly, the African Court should state what resource implications their decisions will have.¹¹⁶¹

The African Commission can further strengthen the interpretation of article 26(2) through general comments, decisions on communications and concluding observations on state reports. The African Commission has not yet released a general comment focused on the interpretation of article 26(2) and this would prove beneficial as the role of gender responsive budgeting, to realise the rights of diverse women, could be reiterated.¹¹⁶² The role of state reporting is crucial in ensuring that state parties abide by their obligations in the Maputo Protocol.¹¹⁶³ State parties need to take the reporting more seriously and follow the reporting guidelines which are made

¹¹⁵⁷ CESCR General Comment 3 para 10. See chapter four part 4 3 1 4 above.

¹¹⁵⁸ Liebenberg *Socio-Economic Rights* 149.

¹¹⁵⁹ CESCR General Comment 3 para 4.

¹¹⁶⁰ Part 5 2 above.

¹¹⁶¹ Part 5 2 1 above.

¹¹⁶² Part 5 2 2 1 above.

¹¹⁶³ Part 5 2 2 2 above.

available. In particular, state parties need to extensively report on their gender responsive budgeting initiatives and how anti-essentialist feminist legal theory forms a part of those strategies. The Special Rapporteur was also discussed as a significant supervisory body which can affect change in state parties through holding regular conferences and training sessions.¹¹⁶⁴ The Special Rapporteur needs to hold sessions on gender responsive budgeting, as well as how anti-essentialist feminist legal theory can play a greater role in these strategies.

The transformation of the budgetary process to one of gender responsive budgeting was considered in part 5 3. Effectively allocating resources for the realisation of women's rights can be achieved through a comprehensive gender responsive budgeting strategy which is sensitive to the contexts of different African women. The importance of the involvement of NGOs and civil society who represent diverse women was further reiterated.¹¹⁶⁵ NGOs and civil society are able to ensure the interests of diverse women are considered at every stage of the budgetary process. There are various strategies for generating resources and spending resources.¹¹⁶⁶ For state parties under the Maputo Protocol, a holistic approach to gender responsive budgeting with a focus on the significance of an evaluation of the impact that national budgets have on diverse women is ideal. Revenue strategies, such as taxation policies, have the possibility of adversely affecting poor women, thus state parties need to examine their taxation policies with the needs of diverse women in mind. State parties also need to justify their expenditure strategies with due consideration for the multiple levels of discrimination that women face.¹¹⁶⁷

There are specific resource-intensive provisions which state parties to the Maputo Protocol need to provide for in their gender responsive budgeting strategies.¹¹⁶⁸ The prohibition of discrimination, gender-based violence, access to justice, health care, harmful stereotypes and non-monetised care work economy need to remain at the forefront of state parties' expenditure strategies or form part of pilot sectors to be addressed first. The final part of this chapter explained the significant burden of proof

¹¹⁶⁴ Part 5 2 3 above.

¹¹⁶⁵ Part 5 3 1 above.

¹¹⁶⁶ See parts 5 3 2 and 5 3 3 above respectively.

¹¹⁶⁷ Part 5 3 3 above.

¹¹⁶⁸ Part 5 3 4 above.

which state parties would face if they argued that they could not realise women's rights because of resource constraints.¹¹⁶⁹

¹¹⁶⁹ Part 5 3 5 above.

CHAPTER 6: CONCLUSION

6 1 Overview of the research

This thesis sought to establish the nature of states' obligations under article 26(2) of the Maputo Protocol. The primary hypothesis which guided the research acknowledged that the relevant supervisory bodies did not adequately interpret article 26(2) of the Maputo Protocol to effectively realise women's rights. This hypothesis was confirmed correct as it was established in chapter 2 that state parties to the Maputo Protocol do not adequately allocate resources to realise women's rights. This is due to the lack of an interpretative framework which state parties can utilise, as well as a lack of political will from state parties. To engage effectively with the primary research question, three secondary research questions, along with three secondary hypotheses were put forward. These were addressed in turn in chapters 2, 3 and 4 respectively.

Chapter 2 assessed the current interpretation of article 26(2) of the Maputo Protocol by establishing how the African Commission and African Court have interpreted resource allocation for the effective realisation of human rights in terms of the Maputo Protocol and the ACHPR. This chapter found, as a point of departure, that there has been no direct interpretation of article 26(2) of the Maputo Protocol by the supervisory bodies responsible for overseeing its implementation. The Maputo Protocol has only been referred to in two cases that came before the African Court, one of which was held to be inadmissible. Thus, the African Court has, in its jurisprudence, provided a limited interpretation of the Maputo Protocol as a whole.

The analysis of state reports filed under the Maputo Protocol furthermore showed that state parties are unclear as to how resource allocation under the Maputo Protocol should be interpreted and states made very few references to gender responsive budgeting initiatives, as is required by the reporting guidelines. Apart from being uncertain as to how to allocate resources to realise the rights in the Maputo Protocol, some state parties also lacked the political will to design effective budgetary policies which protects women's rights. Where state parties referred to gender responsive budgeting initiatives, the African Commission was reluctant to refer to these initiatives and comment on best practices among state parties.

In addition, the interpretation of resource allocation under the ACHPR has been sparse and has not provided adequate guidance to state parties. However, where the African Commission did comment on resource allocation in terms of the ACHPR, it

was reiterated that there are no rights in the ACHPR that cannot be realised, despite resource constraints, and there are always concrete steps that can be taken towards the full realisation of these rights. Chapter 2 showed that a lack of sufficient and rigorous interpretation of resource allocation under the Maputo Protocol has led to discrepancies and gaps in the guidance provided to state parties to fulfil their obligations under the Maputo Protocol.

Chapter 3 analysed the significant role that feminist legal theory and gender responsive budgeting can play as a theoretical lens in developing the interpretation of the obligations in article 26(2) of the Maputo Protocol to remedy some of the defects identified in chapter 2. The secondary research question guiding the research in this chapter considered to what extent feminist legal theory and gender responsive budgeting could be used to assist in the interpretation of the resource allocation instruction under article 26(2) of the Maputo Protocol.

Particular attention was paid to anti-essentialist feminist legal theory because of its responsiveness to intersecting grounds of discrimination such as gender, race, class, sexual orientation, culture, and religion. It was shown that anti-essentialist feminist legal theory is relevant to the Maputo Protocol since it includes the lived experiences of a large diversity of women in Africa.

The second part of this chapter examined the role of gender responsive budgeting in interpreting budgetary and resource allocation obligations under the Maputo Protocol. Gender responsive budgeting represents a practical governance tool to give effect to some of the key insights of feminist legal theory. Gender responsive budgeting was shown to be an initiative which resulted from feminist legal theory. The contrasting definitions and purposes of gender responsive budgeting illustrated how the mainstreaming of prominent issues that women face in every aspect of a state budget is required. However, the potential for further development of anti-essentialist legal theory and its relevance in the gender responsive budgeting frameworks was prominent in this chapter.

Chapter 4 established that an analysis of the interpretation of resource allocation for the effective realisation of human rights under CEDAW and the ICESCR can assist in guiding supervisory bodies to interpret and evaluate article 26(2) of the Maputo Protocol. The secondary research question guiding this chapter focused on how an analysis of the interpretation of resource allocation for the effective realisation of human rights under CEDAW and the ICESCR can assist in guiding supervisory bodies

to interpret and evaluate article 26(2) of the Maputo Protocol. This analysis confirmed the hypothesis that resource allocation for the realisation of human rights has been thoroughly interpreted and analysed under CEDAW and the ICESCR and can accordingly provide guidance to interpret article 26(2) of the Maputo Protocol.

The general recommendations, as well as concluding observations on state reports, of CEDAW show that there are clear obligations on state parties to ensure that sufficient resources have been allocated to realise the rights in CEDAW. The CEDAW Committee has also provided state parties with guidance, through various communications, on how certain rights in CEDAW can be realised by allocating sufficient resources. Gender responsive budgeting has, importantly, been established as a strategy for state parties to realise their obligations in terms of CEDAW. The CEDAW Committee has furthermore analysed and applied elements of anti-essentialist feminist legal theory, however, there is still an opportunity for further development.

The ICESCR has an operating provision in article 2(1) which creates clear resource obligations on state parties. The CESCR has, through general comments, communications and statements, elaborated on these obligations. Elements of article 2(1) such as maximum available resources, progressive realisation, retrogressive measures, minimum core obligations and extraterritorial obligations were analysed to establish best practices of state parties under the ICESCR. Particular strategies for generating resources and spending resources in terms of the ICESCR were analysed and shown to have broad application.

Finally, chapter 5 developed an interpretative framework for article 26(2) of the Maputo Protocol. The first part of chapter 5 considered how article 26(2) of the Maputo Protocol should be interpreted by the supervisory bodies. It was argued that the African Court should address resource allocation within cases specifically referring to the Maputo Protocol. Further that it should, specifically, address the needs of diverse women who face multiple levels of discrimination. The African Commission was shown to have great potential to further interpret article 26(2) through its general comments, communications and concluding observations on state reports. Particularly, it was shown that the African Commission must address resource allocation in a general comment specifically focused on article 26(2) of the Maputo Protocol which contextualises the role of state parties in protecting and empowering women with multiple identities through their gender responsive budgeting initiatives. The role of the

Special Rapporteur was discussed and improvements were suggested to ensure the most effective implementation mechanisms.

The issues that were identified in chapter two were addressed through the theoretical lens of gender responsive budgeting and anti-essentialist feminist legal theory. The lessons from CEDAW and the ICESCR, as discussed in chapter 4, were utilised in chapter 5 to ensure that state parties to the Maputo Protocol would effectively and efficiently realise women's rights. As part of the gender responsive budgeting strategy, particular attention was paid to the involvement of NGOs and civil society in the budgeting process, strategies for generating and spending resources, as well as how state parties should approach resource constraints. As resource constraints are an issue that many African states face, this formed a central point of state parties' obligation to make resources available to realise women's rights. It was established that a comprehensive gender responsive budgeting strategy, which is sensitive to the contexts of different African women is needed. These strategies would need to be adapted depending on the needs of women in a specific country.

6 2 Recommendations

In light of the findings of this research, it is recommended that the African Court and the African Commission make clear references to article 26(2) of the Maputo Protocol within their cases and communications, respectively. These references need to be contextualised to the facts of the cases and communications, as well as the needs of the particular group of women affected within the cases and communications. It is furthermore recommended that the African Commission release a general comment specifically addressing article 26(2) of the Maputo Protocol. This general comment should articulate the need for state parties to adopt gender responsive budgeting, as well as reiterate the importance of protecting and empowering the most marginalised groups of women. It is also recommended that the African Commission refer to article 26(2) of the Maputo Protocol in all general comments referring to other provisions in the Maputo Protocol. The African Commission must state the specific resources and budgetary allocations which would be required to realise the right being discussed in the general comment, as well as the groups of women who would be most adversely affected by insufficient resource allocations.

In addition, it is recommended that state parties report timeously to the African Commission on their efforts to realise women's rights. State parties should ensure that they include detailed references to their gender responsive budgeting initiatives. State reports must include information regarding the status of implementation of gender responsive budgeting strategies, how it affects diverse women and monitoring and evaluation strategies. In this way, the African Commission will be able to provide extensive feedback regarding current gender responsive budgeting strategies and potential areas of improvement. It is recommended that the African Commission establish gender responsive budgeting as a priority for state parties to the Maputo Protocol by providing feedback on proposed strategies in their concluding observations on state reports and questioning state parties on its absence if there is no reference made to these strategies in the state reports. It is also recommended that the Special Rapporteur perform comparative studies on the situation of women in different African countries (preferably within sub-regional economic communities) as well as the effect that gender responsive budgeting has on women's rights.

It is moreover recommended that state parties to the Maputo Protocol fulfil their obligations in terms of article 26(2) by establishing gender responsive budgets that can effectively mobilise resources to realise women's rights. These gender responsive budgets need to be contextualised to address the diverse needs of women within a specific country. State parties are also recommended to develop gender responsive budgeting goals and objectives within sub-regional economic communities.

State parties to the Maputo Protocol are recommended to ensure the active participation of NGOs and civil society at every stage of the budgetary process. In this way, state parties can ensure that their gender responsive budgets adhere to human rights principles, such as participation and accountability.¹¹⁷⁰ It is recommended that state parties first conduct a fact-finding evaluation of the current condition of women in their country. This evaluation must be assessed against disaggregated data to provide an accurate depiction of the needs of diverse women and how resource allocation is currently affecting them. This will guide the state parties in designing gender responsive budgets which are responsive to the needs of the women in their country.

¹¹⁷⁰ See chapter five part 5.3.1.

In terms of the interpretative framework for article 26(2) of the Maputo Protocol, as established in chapter 5, gender responsive budgets have to be holistic in how they propose to generate and spend resources.¹¹⁷¹ It is recommended that state parties provide, in their budgets, for comprehensive gender-sensitive revenue and expenditure strategies. In terms of revenue strategies, it is recommended that state parties re-evaluate their taxation systems to ensure that they do not adversely affect poorer communities, and in particular, poorer women. State parties are also recommended to establish mutually beneficial international cooperation strategies which would assist in combatting resource constraints. These cooperation strategies would be most effective in sub-regional economic communities.

In terms of expenditure strategies, state parties should ensure that they take immediate steps towards the realisation of the rights in the Maputo Protocol which creating long terms strategies to progressively realise the full rights in the Maputo Protocol. State parties are also recommended to focus on core resource-intensive provisions in the Maputo Protocol or establish a few sectors as pilot sectors. The prohibition of discrimination, gender-based violence, access to justice, health care, harmful stereotypes and non-monetised care work economy needs to remain at the forefront of state parties' expenditure strategies, as these areas require significant resources and they have extensive gender implications.

6 3 Areas for potential further research

This research would be complemented by further research into resource allocation under the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. More extensive case studies into particular state parties, such as Rwanda and South Africa, could moreover provide clarity on state parties' implementation of budgeting for the Maputo Protocol, as well as other international treaties. Rwanda and South Africa have already indicated their use of gender responsive budgeting in their state reports to the African Commission, thus these strategies could become the subject of further research and comparison. The gender responsive budgeting strategy of the SADC could also form the basis of further research to establish whether member states have applied the strategy and what the results have been.

¹¹⁷¹ See chapter five parts 5 3 2 and 5 3 3 respectively.

6 4 Concluding reflections

The situation of women's rights in Africa is one in need of great attention and improvement. The Maputo Protocol provides an encouraging step towards the full empowerment of African women. For this to become a reality, resources, which are targeted at the full realisation of the rights of diverse African women need to be deployed. However, article 26(2) of the Maputo Protocol is still underutilised. The lack of an interpretative framework for resource allocation results in state parties not understanding their obligations in terms of the Maputo Protocol, or simply not prioritising this area of law.

This research has shown that effective resource allocation is crucial to the full realisation of women's rights. It is clear that the African Court, the African Commission, the Special Rapporteur, civil society and state parties need to work together to ensure that women's rights are fully protected and resources are allocated effectively to empower all women.

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